Supreme Court, U.S.
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No. 98-

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Warren I. Jackson,
Petitioner

v.

NCT and PFS Corp.
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Pro Se

165 pp

QUESTIONS PRESENTED

This action under Title VII of the Civil Rights Act of 1964 alleges that employer discriminated against petitioner because of his race, black, in the terms, conditions, and privileges of employment. Respondents' motion for summary judgement was granted by the district court and affirmed by the appellate court after reviewing for reversible error.

1. There are diverging views and interpretations among the circuits with regard to what a plaintiff must show to survive a summary judgment motion. What is the appropriate showing, and did the district court make an error of law by requiring an ultimate burden of proof showing?

2. The district court, in ruling, did not establish the legal elements of a circumstantial, prima facie case of disparate treatment. Is this failure an error of law?

3. The district court, prior to rendering a decision as a matter of law, relied upon respondents' arguments. Since respondents inter alia, argued against petitioner's credibility, did the district court error?

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Warren I. Jackson,
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v.

NCT and PFS Corp.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Warren I. Jackson petitions for a writ of certiorari to review the judgment and opinions of the United States District Court, Eastern District of

North Carolina, Southern Division, entered in this case on October 30, 1995 and December 17, 1995. Affirmed by the United States Court of Appeals for the Fourth Circuit on April 28, 1998.

OPINIONS BELOW

The memorandum-opinions of the district court are unreported and are reproduced at page 4 and page 9 (A4 and A9) of the Appendix. The court of appeals unpublished opinion affirming the district court's opinions is at A77. The court of appeals' denial of petition for rehearing with suggestion for rehearing en banc is at A75.

JURISDICTION

The court of appeals entered judgment on April 28, 1998, and the petition for rehearing with suggestion for rehearing en banc was denied on June 9, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

STATUTORY PROVISION INVOLVED

This case involves application of the following language of 42 U.S.C. sec. 2000e-2(a) (1) - (2).

> (1) to ... discriminate against any individual with respect to his ...

> terms, conditions, or privileges of employment, because of such individual's race ...
>
> (2) to limit ... employees ... in any way which would deprive or tend to deprive an individual of employment opportunities or adversely affect his status as an employee, because of such individual's race ...

STATEMENT OF CASE

Warren I. Jackson, petitioner, filed this Title VII action against his employer on December 1, 1995 (A80), after obtaining an EEOC Right to Sue on September 2, 1995 (A126).[1] Petitioner alleged that employer had discriminated against him because of his race, black, in the terms, conditions and privileges of employment. Supervision restricted petitioner from utilizing and directing less senior staff, although directing less senior staff was customary and necessary to fulfill the material duties of his position as a senior process engineer. Petitioner further alleged that employer's discrimination caused his depression and subsequent disability. NCT Corp et. al. denied these allegations in their entirety.

---

[1]Petitioner filed his amended complaint on December 12, 1995 to show NCT Corp. et. al. as Defendants.

Following the end of discovery, respondents filed a motion for summary judgment. Despite petitioner's response in opposition to respondents' motion, the District Court granted summary judgment for respondents, holding that:

> "The court need not repeat the facts of the case or engage in a lengthy discussion of law and its application to those facts . . . the defendants have adequately and accurately exposed the numerous weaknesses in his case in their memorandum in support of the motion for summary judgment and in their reply brief. For the reasons stated there, and because the court finds in the record no evidence that Plaintiff's disability was caused by unlawful discrimination or harassment on the part of the defendants, the defendants' motion for summary judgment is ALLOWED and this action is DISMISSED WITH PREJUDICE." (A6-A7)

Petitioner filed a motion for reconsideration requesting that the district court set forth its reasons for dismissal in sufficient detail to determine if the appropriate legal tests were applied.

In denying petitioner's motion for reconsideration, the district court stated that:

> "The Court in ruling, adopted and relied upon the defendants' arguments in its memoranda to the court." (A9)

Hence, respondents' memorandum (A11) and reply brief (A57) are incorporated as the opinion of the district court.

Petitioner's appeal was timely filed and the appellate court affirmed the district court's opinion (A77).

Petitioner timely filed a petition for rehearing with a suggestion for rehearing en banc, which was denied on June 9, 1998. (A75)

This appeal arises as a result of the lower courts' sanctioning of the respondents' arguments in their summary judgment motion and reply brief as the basis for entering judgment against petitioner, while failing to set forth the prima facie case elements, and because the fourth circuit's required showing for a Title VII plaintiff to defeat an employer's summary judgment motion is in conflict with this Court and other circuits.

REASONS FOR GRANTING WRIT

This Court has historically granted certiorari because of diverging views and interpretations among the circuits. In *St. Mary's Honor Center v. Hicks* 509 U.S. 502, this Court addressed and identified the required showing for an employer to defeat a plaintiff's summary judgment motion. However, the required showing for a plaintiff to survive an employer's motion for summary judgment remains unsettled among the circuits.

The sixth circuit holds that plaintiff need only to establish a prima facie case to defeat and employer's summary judgment motion. *EEOC v. Avery Dennison Corp.* , 104 F. 3d 858, 861 (6th Cir. 1997) (Defendant is not entitled to summary judgment if plaintiff has proven its prima facie case).

In the tenth circuit, a Title VII plaintiff must establish a prima facie case, and then raise genuine issues of material fact with regard to an employer's proffered legitimate business reason. *Morgan v. Hilti, Inc.*, 108 F. 3d 1319, 1321 (10th Cir.1997) (On summary judgment, plaintiff's burden is only to demonstrate genuine dispute of material facts as to whether the proffered reasons were unworthy of belief). *Randall v. City of Aurora*, 69 F. 3d 441, 451 (10th Cir. 1995) (To avoid summary judgment, a plaintiff need not demonstrate the discriminatory reasons motivated the employer's decision). *Ingels v. Thiokol Corp.* 42 F. 3d 616, 622 n.3 (10th Cir.

1994) (Demonstrating pretext gets plaintiff 'over the hurdle' of summary judgment).

Moving to the fourth circuit, the standard for review is a pretext-plus showing for a Title VII plaintiff to survive summary judgment. After a prima facie showing,

> "the plaintiff must then demonstrate that the employer's reason was mere pretext for retaliation by proving 'both that the reason fails, and that discrimination was the real reason for the challenged conduct.' "

Beall v. Abbott Lab, 130 F. 3rd 614, 619 (4th Cir.1997). Quoting *Jiminez v. Mary Washington College*, 57 F. 3d 369, 377-78 (4th Cir. 1993).

> "To survive . . . summary judgment under the McDonnell-Douglas paradigm the plaintiff must do more than merely raise a jury question about the veracity of the employer's proffered justification."

Gillins v. Berkeley Elec. Coop., Inc., 1998, W.L. 381092 (4th Cir.1998).

There lacks consistency among the circuits with regard to the appropriate review standard for a plaintiff to survive summary judgment. However,

the appropriate standard is identified to be a prima facie showing by merging well established case law with regard to Rule 56 of the Federal Rules of Civil Procedure and the familiar *McDonnell-Burdine* model.

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

In the *McDonnell-Burdine* model, once the prima facie case is established, the burden shifts to the employer to proffer its non-discriminatory reasons for an adverse action. If the employer meets his burden, then the burden shifts back to the plaintiff to show pretext. In the absence of direct evidence, plaintiff may show the employer's proffered reasons are pretext by demonstrating these reasons to be "unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 211. The proffered reasons can be shown unworthy of credence by

> "such weaknesses, implausibilities, inconsistencies, incoherencies, or

> contradictions in the employer's proffered legitimate reasons that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons."

Olsen v. General Elec. Astrospace, 101 F. 3d 937, 951-52 (3rd Cir. 1996) (quoting *Fuentes v. Peskie*, 32 F. 3d 759, 765 (3rd Cir. 1994)).

Hence, by the very nature of the *McDonnell-Burdine* model, demonstrating pretext requires the factfinder to draw inferences from the facts, to make a determination of credibility, and to weigh the evidence. However, these are jury functions. Therefore, plaintiff's required showing should not go beyond the prima facie case demonstration, since proceeding to the stage of pretext involves an assessment of credibility.

In *St. Mary's Honor Center*, 509 U.S. 502, this Court determined that once a plaintiff has made a prima facie showing, if the employer remains silent, then the "Court must award judgment for the plaintiff as a matter of law." *Id.* at 509. However, the plaintiff is not entitled to summary judgment if the employer proffers a non-discriminatory reason because "the determination that a defendant has met its burden of production ... can involve no credibility assessment," *Id.* at 509.

Hence by definition, all the defendant has done by proffering a non-discriminatory reason whether true or not, is to create a genuine issue of material fact, since this proffering eliminates a plaintiff's entitlement to summary judgment. It then logically follows that neither party is entitled to summary judgment at this stage, because there exists genuine issues of material fact. Therefore, a plaintiff need only to establish the prima facie case to defeat an employer's summary judgment motion.

In *U.S. Postal Service Bd. v. Aikens*, 460 U.S. 711 (1983), this Court stated

> "that when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case and defendants respond to the plaintiff's proof by offering evidence of the reason for plaintiff's rejection . . . the **factfinder** must then decide whether the rejection was discriminatory . . . "

(Emphasis added). *Id.* at 714-15.

In this case the factfinder is the jury (A84). Hence, a prima facie showing only, should be

sufficient for petitioner's case to go to trial.[2]

Now to consider, without arguing the merits of the case, the issue as to whether or not petitioner demonstrated the required showing to defeat employer's summary judgment motion. This Court must turn to the written opinions of the district court. (A4 and A9).

The district court however, failed to set forth in its opinion the legal elements for establishing a circumstantial prima facie case of disparate treatment using *McDonnell*. Determining the required legal showing for a prima facie case is a matter of law and hence, can be reviewed de novo. *Gafford v. General Electric Co.*, 997 F. 2d 150,168 (6th Cir. 1993) (Determining the components of the *prima facie* case is a matter of law.) *Hagans v. Clark*, 752 F. 2d 447, 480 (9th Cir. 1985) ("The decision . . . to interpret case law to require a particular *prima facie* showing, is a legal judgment freely reviewable on appeal.") *cf. Mitchell* 759 F. 2d at 84-86 (Holding that the district court's formation of the elements for a Title VII case of disparate treatment was legally incorrect.) *Aikens*, 460 U.S. 711, 712 (1983) (The district court erred in requiring Aikens to show, as part of his prima facie case that he was as qualified or more qualified than the people who were promoted.)

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[2]Respondents proffered non-discriminatory business reasons in their summary judgment memoranda in response to plaintiff's proof. (See A43, n. [41].)

Since the record does not show wherein the district court identified the elements for a prima facie showing and we cannot read minds, we must conclude that whether or not plaintiff had made a prima facie showing was not part of the district court's reasoning in granting respondents' summary judgment.[3] To conclude otherwise calls for speculation.

Instead, the record shows that the respondents were the finders of fact and made the critical decisions on matters of law:

> "the court, **in ruling ...relied upon** the defendant's arguments in its memoranda to the court."

(A9) (Emphasis added.)

It would have been more appropriate if the district court had relied upon well established case law in deciding a question of law, instead of respondents' speculative arguments, attacks on

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[3]The district court stated that "the court finds . . . no evidence that plaintiff's disability was caused by unlawful discrimination or harassment", (A7). However, this cannot be a prima facie element as a matter of law, because *showing unlawful* discrimination or harassment requires plaintiff to meet his ultimate burden of proof.

petitioner's credibility, and obfuscated accounting of facts and conclusions of law.

For example, respondents' conclude in their memoranda that "plaintiff's claim fails as a matter of law because he left work due to a psychiatric illness, not as a result of any adverse employment action." (A12). This implies that plaintiff must show that he left work due to an adverse action to establish a prima facie case. Although such a showing would be appropriate in a case of constructive discharge or termination, it is legally incorrect in this disparate treatment case.

Respondents conveniently recognize only pecuniary adverse actions, wherein this suit involves language under 42 U.S.C. sec. 2000e - 2(a) (1), which prohibits discrimination in "terms, conditions, and privileges of employment." In a disparate treatment case, a materially adverse change can be indicated by "significantly diminished material responsibilities," *Crady v. Liberty National Bank and Trust Co. of Indiana*, 993 F. 2d 132 (7th Cir. 1993), or by functional isolation of an employee. *See Collins v. State of Illinois*, 830 F. 2d 692, 703-04 (7th Cir. 1987) (Finding an adverse employment action where a library employee after transferred to a new department, was largely relegated to reference rather than consulting work, and had lost her office and telephone.) *See Johnson v. City of Fort Wayne, Indiana*, 91 F. 3d 922, 933, (7th Cir. 1996) (Finding an adverse employment

action when assistant fire chief was excluded from meetings which functionally isolated him and precluded him from fulfilling the responsibilities of the office to which he had been appointed.)

In this case, the record shows that beginning in July 1992, until October 27, 1992,[4] petitioner was required to work in isolation without the customary assistance of less senior staff (A88, II) (A91-A92) (A103,9.). Petitioner testified that such isolation was programmed failure: that he could not perform the material duties of his position as a result of employer's imposed limitation. (A115,12-23).

The record clearly shows that similarly situated senior process engineers outside the protected class were not required to work in isolation, based on petitioner's testimony (A112,3 thru A113,7). In fact, other senior process engineers were commended in their performance reviews for directing less senior staff (A116,1 thru A117,22).

This functional isolation of petitioner constitutes an adverse action under 42 U.S.C. sec. 2000e-2(a)(2), which prohibits respondents from limiting petitioner ". . . in any way which would tend to deprive . . . or adversely affect his status as an employee." In addition, directing less senior staff was a material duty of the senior process engineer

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[4]Petitioner left work on short term disability October 27, 1992 due to depression.

position, as evidenced by respondents' positive recognition of other senior process engineers for this activity in their performance reviews. Hence, restricting petitioner from directing less senior staff constitutes a decrease in material responsibility as well as a reduction in status, which rises to the level of an adverse action. See *Crady v. Liberty National Bank and Trust Co.*, 993 F. 2d 132,136 (7th Cir. 1993). (Holding that an adverse action can be indicated by diminished material responsibilities or other indices.)

It is undisputed, based on second line supervisor Ken Stach's testimony (A118,13 thru A119,19), that petitioner's performance was satisfactory at the time of the July 1992 functional isolation of petitioner by the respondents. The record further shows that petitioner's performance was rated 'quality' at year-end 1991 (A97). Therefore all elements of a prima facie case of disparate treatment have been demonstrated.

These discriminatory terms and conditions imposed upon petitioner in July, 1992, were a continuous violation through October 27, 1992, since respondents never rescinded these terms and conditions. The record shows from petitioner's testimony that he attempted to negotiate requirements. However, respondents would not yield in their position that petitioner was to work in functional isolation. (A113,19 thru A114,11)

Failure of the district court to recognize petitioner's isolation as an adverse action can be explained by its reliance upon respondents' arguments in ruling, and its failure to properly establish the legal elements of a prima facie case of disparate treatment. However, not recognizing this adverse action can equally be explained by the district court relying upon respondents' arguments against petitioner's credibility.

Respondents in their memorandum, clearly step out of bounds with their attacks on petitioner's credibility:

> "Plaintiff's psychiatric records, which were produced over his initial objections, show that plaintiffs reports of racial discrimination are unreliable..." (A12).
>
> "Plaintiff has been diagnosed with a number of psychiatric problems..." (A30).
>
> "The available psychiatric evidence shows that plaintiff's allegations of discrimination are not reliable..." (A35).
>
> "Mr. Jackson is a poor and likely unreliable historian..." "Mr. Jackson is ...paranoid..." (A37).

Although a major theme throughout respondents' memoranda, such argument sheds no light on any material issues of this case and hence, serves only to bias the court against petitioner's credibility. Argument against credibility is in direct conflict with well established law.

In viewing a motion for summary judgment, it is well established law that the "evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 255. Because the district court in ruling on a matter of law relied upon respondents' credibility argument, this alone calls for an immediate reversal of the judgment entered against petitioner. *Payne v. Milwaukee County Review Bd.* 145 F. 3d. 430 (7th Cir. 1998) (Reversing district court for not following the proper standard for rendering judgment as a matter of law.)

In addition to the functional isolation, the record further shows the continuation of disparate treatment in terms of petitioner's compensation.

From Kenneth Stach's testimony, respondents decided in October 1992 that petitioner's performance was 'requires improvement', precluding him from a bonus and cost of living increase (A118,13 thru A119,2) (A122,9 thru A124,7). Per Mr. Stach, similarly situated senior process engineers outside the protected class were awarded their bonuses and cost of living increases, since none of

them were on an improvement plan (A120,14 thru A121,24).

Petitioner clearly expressed to EEOC his concerns regarding compensation in his EEOC affidavit (A93). Respondents' argument (A62,B. thru A63) that petitioner is precluded because of his EEOC charge from pursuing disparate compensation represents tunnel vision.

The scope of an action in district court has historically been governed by the scope of an EEOC investigation that could reasonably be expected to grow from the EEOC complaint. In *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972) and in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982), this Court admonished that technical readings of exhaustion requirements would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

A hostile work environment claim should have reasonably grown from petitioner's EEOC complaint / affidavit. Petitioner alleged discrimination in the terms and conditions of employment (A88, I.). Petitioner also stated in his EEOC affidavit that he had "been on short term disability since October 27, 1992" (A91). The record shows EEOC was aware that the nature of petitioner's disability was psychological (A132).

The record further shows that respondents began monitoring petitioner's every move and gave petitioner numerous oral reprimands (A103,9.). They kept "Notes on Warren Jackson," in which they even documented petitioner's sitting position during a meeting (A135, October 12, 1992 entry).

Petitioner's treating physician, Dr. Patterson, stated in no uncertain terms that petitioner's depression was "clearly related to the environment that he was in at Cape Industries"[5] . Dr. Patterson was also aware of respondents plan to terminate petitioner (A109).

> "The phrase 'terms, conditions, or privileges of employment in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the **emotional** and **psychological** stability of minority workers . . ."

Meritor Savings Bank v. Vinson, 477 U.S. 57,66 (1986) (Emphasis added).

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[5]Cape Industries later became NCT and PFS Corporation.

CONCLUSION

The practice of relying upon an employer's arguments by a court, prior to a court rendering its decision on a matter of law, sets a dangerous precedent if allowed to remain unchallenged: no plaintiff will ever be able to survive an employer's summary judgment motion, people of protected class will be exposed to illegal adverse action at an employer's will, and Title VII will remain an illusory promise.

The district court in this case has 1) required an ultimate burden of proof showing at summary judgment, 2) failed to establish the elements of a prima facie case, 3) failed to recognize a prima facie showing of discrimination in the terms, conditions, and privileges of employment, 4) failed to recognize a hostile work environment, and 5) adopted inter alia, arguments against petitioner's credibility.

Because the district court has so far departed from the normal course of judicial proceedings, petitioner respectfully calls for, without any further briefing or argument, an immediate reversal of the district court's order entering summary judgment against him, or in the alternative a reconsideration or remand of the district court's orders.

Respectfully submitted,

Warren I. Jackson
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(910) 452-5306

Pro Se

APPENDIX

Judgment, U.S. District Court,
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Affidavit of Dr. Daniel Patterson
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AO 450 (Rev. 5/85)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
FILED
OCTOBER 30, 1996

WARREN I. JACKSON,
)
Plaintiff,)
)
)
v.)
) JUDGMENT
) IN A CIVIL
) CASE
) CASE NO.
7:95-CV-175-F3
NCT CORPORATION,
ET.AL)
Defendants,)

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's Motion for Reconsideration is DENIED. Defendants' Motion for Summary Judgment is ALLOWED. Defendants' Motion to Dismiss and for Sanctions is DISMISSED AS MOOT. This action is DISMISSED WITH PREJUDICE.

THE ABOVE JUDGMENT WAS ENTERED TODAY, October 30, 1996, AND A COPY MAILED TO:

Warren I. Jackson
4101 Appleton Way
Wilmington, NC 28412

George V. Hanna III, Esq.
P0 Box 3843
Durham, NC 277002-3843

October 30, 1996
Date

DAVID W. DANIEL
Clerk

Wilmington, North Carolina
/s/ Sarah Allison Thornton
(By) Deputy Clerk
SEAL *United States District Court For The Eastern District of North Carolina*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

FILED
October 30, 1996

No. 7:95-CV-175-F3

WARREN I. JACKSON,)
Plaintiff,)
)
v.) ORDER
)
)
)
)
)
NCT CORPORATION , et al.,)
Defendants.)

This matter is before the court on the plaintiff's motion for reconsideration of the Magistrate Judge's Order denying an extension of time within which to conduct discovery. Also before the court are the defendants' motion to dismiss and for sanctions, and the defendants' motion for summary judgment. For the reasons that follow, the court will deny the plaintiff's motion for reconsideration, allow the defendants' motion for summary judgment, and dismiss as moot the defendants' motion to dismiss and for sanctions.

Plaintiff filed his amended complaint against Defendant, his employer, on December 12, 1995, alleging racial discrimination in the "unreasonable workload [assigned him] versus similarly situated white Senior Process Engineers." (Am. Compl. at 6.) Plaintiff further alleges that, after pointing out this discrepancy, he received an unfavorable midyear review and was then "constantly harassed by supervision," causing him to "go into depression." (Id. at 6-7.) As a result, he has been on long-term disability since October 27, 1992. (Id. at 7.)

Plaintiff has appeared pro se throughout this action, and several discovery disputes have been resolved by United States Magistrate Judge Wallace W. Dixon. On August 15, 1996, Judge Dixon denied the plaintiff's motion to extend time for discovery. On August 30, 1996, Plaintiff filed his motion for reconsideration of the August 15 Order. The court has carefully reviewed that motion and the materials Plaintiff submitted in support of the motion, as well as the entire record in this action, and Plaintiff's motion for reconsideration is DENIED.

On August 20, 1996, Defendants filed a motion to dismiss and for sanctions pursuant to Federal Rule of Civil Procedure 37 for Plaintiff's failure to comply with prior Orders of this court regarding the conduct of discovery. On September 5, 1996, Defendants filed a motion for summary judgment. Because the court's ruling on the motion

for summary judgment will moot the motion to dismiss and for sanctions, that motion is DISMISSED.

Turning now to the motion for summary judgment, the court states again the familiar guiding principles. The court must view the facts in the light most favorable to the plaintiff as the non-moving party, and draw all reasonable inferences in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Smith v. Virginia Commonwealth University, 84 F.3d 672, 675 (4th Cir. 1996) (en banc). The court will allow the motion "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

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Again, the court has carefully reviewed the motion for summary judgment and supporting materials, and the materials submitted by the plaintiff in opposition to the motion, as well as the entire file. The court need not repeat the facts of the case or engage in a lengthy discussion of the law and its application to those facts. Though Mr. Jackson has represented himself remarkably well in this action and has had the full range of discovery available to him to flesh out his allegations of racial

discrimination, the defendants have adequately and accurately exposed the numerous weaknesses in his case in their memorandum in support of the motion for summary judgment and in their reply brief. For the reasons stated there, and because the court finds in the record no evidence that Plaintiff's disability was caused by unlawful discrimination or harassment on the part of the defendants, the defendants' motion for summary judgment is ALLOWED, and this action is DISMISSED WITH PREJUDICE.

SO ORDERED

This 29th day of October, 1996.

/s/James C. Fox
James C. Fox
United States District
Judge

I certify the forgoing to be a
true and correct copy of the
original.
David W. Daniel, Clerk
United States District Court
Eastern District of North
Carolina
By/s/ Sarah Allison
Thornton

Deputy Clerk

SEAL *United States District Court for the Eastern District of North Carolina*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:95-CV-175-F3

FILED
DEC 17,1996

WARREN I. JACKSON,
Plaintiff,

)
)
) ORDER
)

v.

NCT CORPORATION , et al., Defendants.

This matter is before the court on the plaintiff's motion for reconsideration of the court's October 30, 1996, Order granting summary judgment to the defendants. The court explained in that order that it allowed the motion for summary judgment "[f]or the reasons stated [in Defendants' supporting memoranda], and because the... record [revealed] no evidence that Plaintiff's disability was caused by unlawful discrimination or harassment on the part of the defendants...." This statement gave adequate notice to Plaintiff that the court, in ruling, adopted and relied upon the defendants' arguments in its memoranda to the court.

The motion for reconsideration is DENIED.
SO ORDERED

This 17th day of December, 1996.

/s/ James C. Fox
JAMES C. FOX
United States District Judge

I certify the foregoing to be a true and
correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina

By /s/ Susan K. Nixon
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
NO. 7:95-CV-175 F(3)

WARREN I. JACKSON, Plaintiff,	) FILED) SEP 5 1996
v.	) David W. Daniel,Clerk) U.S.District Court) E. DIST.NO.CAR.
NCT CORPORATION and PFS CORPORATION, a joint venture DBA "HOECHST CELANESE POLYESTER INTERMEDIATES", Defendants.	) MEMORANDUM)OF LAW IN SUPPORT)OF MOTION FOR)SUMMARY)JUDGMENT

INTRODUCTION

Although Plaintiff was actively employed by Defendants for just over 12 months between October 1991 and October 1992, at which time he began an apparently permanent disability leave, he has been engaged in a Quixotic four-year crusade to blame all

engaged in a Quixotic four-year crusade to blame all of his problems on alleged race discrimination. However, Plaintiff's claim fails as a matter of law, because he left work due to a psychiatric illness, not as a result of any adverse employment action. Plaintiff has not forecast evidence sufficient to show that Defendants engaged in intentional discrimination. In fact, the available evidence is to the contrary. Plaintiff's psychiatric records, which were produced over his initial objections, show that Plaintiff's reports of racial discrimination are unreliable and that a host of factors other than alleged unequal treatment caused Plaintiff to become disabled.

Plaintiff's claim should also be dismissed for failure to meet the statutory requirements for filing suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. Plaintiff has attempted to raise claims in this action which are far beyond the scope of his charge of discrimination filed with the Equal Employment Opportunity Commission (EEOC). Further,

Plaintiff's own testimony in this case shows that he failed to file an EEOC charge within 180 days of when he believed the alleged discrimination occurred.[1]

FACTS[2]

Warren Jackson began work for Cape Industries (a predecessor of the Defendants) in Wilmington, North Carolina on October 7, 1991, as a Senior Process Engineer. The principal assignment for which Plaintiff was hired was the Low Acid Recovery Project, which was aimed at implementing a process for recovering and purifying acetic and formic acids from the waste water created in the manufacture of Dimethyl Terephthalate (DMT), a primary product of Cape Industries. Prior to being hired by Cape Industries, Plaintiff worked as an engineer for DuPont in Wilmington from 1982 to 1988 and for General Electric in Indiana from 1988 to 1991.[3] Plaintiffs initial annual salary at Cape Industries was $57,500.[4]

Plaintiff was actively employed at Cape Industries for just over one year before commencing a disability leave due to a psychiatric condition.[5] During that time, he was never subjected to any discipline which affected his work assignments, hours, pay, or benefits. On April

[1] On August 20, 1996, Defendants filed a motion seeking dismissal of the action as a sanction for Plaintiff's discovery abuses and disregard of prior Court orders. The present motion for summary judgment may be considered either in conjunction with or in the alternative to the prior motion to dismiss and for sanctions.

[2] The following undisputed facts are provided as background to aid the Court's understanding of the case. Other undisputed facts relevant to the pending motion for summary judgment are set forth in the Discussion section, infra.

[3] Ex. 1, Application for Employment, August 7, 1991.

[4]Ex. 2, Employee Transaction/Status Change form, 10/7/91.

[5] Ex. 3, Employee Transaction/Status Change form, 10/27/92.

6, 1992, he received a merit pay increase to $58,800.[6] Between April 1992 and October 1992, Plaintiff's supervisors expressed concerns about Plaintiff's performance, with which Plaintiff disagreed.[7]

On October 26, 1992, after experiencing symptoms of a psychiatric disorder, Plaintiff met with a counselor from the Employee Assistance Program (EAP), who referred him to Dr. Daniel Patterson for further evaluation.[8] Dr. Patterson certified that Plaintiff was unable to work due to a condition he initially diagnosed as depression.[9] Dr.

Patterson also indicated that Plaintiff had made suicidal and homicidal statements.[10] Plaintiff was out of work on short-term disability for six months, from October 27, 1992 to April 27, 1993, during which time he received his regular salary of approximately $4,902 per month as sick pay."

On February 2, 1993, while Plaintiff remained out of work on short-term disability leave, he filed a Charge of Discrimination with the New Hanover Human Relations Commission and the EEOC.[12] Plaintiffs charge stated in full:

[6] Ex. 4, HR'S Employee Personal Profile, 1992 Budget Year.

[7] See, e.g., Ex. 5, Warren I. Jackson, Mid-Year Performance Review, July 27, 1992.

[8] Ex. 6, Employee Assistance Program records.

[9] Ex. 7, Note from Dr. Patterson, October 27, 1992; Ex. 8, Return From Personal Illness form, December 2, 1992.

[10] Ex. 9, Letter from Dr. Patterson to Dr. Armistead, March 1, 1993; Ex. 10, Aetna Attending Physician's Statement, signed by Dr. Daniel Patterson, April 15, 1993.

[11] Ex. 11, Plaintiffs Second Amended Response to Defendants' First Set of Interrogatories (ResponseNo. 10).

[12] Ex. 12, Charge of Discrimination. Plaintiff alleged in his Amended Complaint that he filed his EEOC charge on February 2, 1993.

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I. From around November 1991 to October 27, 1992 I was subjected to different terms and conditions of employment on the basis of my race, black. I have been employed by the Respondent since October 1991 as a Senior Process Engineer. The respondent employs fifteen (15) or more people.

II. From around November 1991 to October 27, 1992 my immediate supervisors denied me access to support personnel that was provided similarly situated white senior process engineers. Also, I believe my immediate supervisors have treated me differently on the basis of my race by violating the employee Corrective Action Policy. I believe the

> Respondent has an equal employment opportunity policy.
>
> III. I believe the Respondent has discriminated against me on the basis of my race/black.

Id.

Notably, Plaintiff's charge alleged only racial discrimination in the terms and conditions of his employment and stated that the latest date of alleged discrimination was 10/27/92. There were no allegations of either a hostile environment due to racial harassment or of continuing illegal action. Plaintiff never amended his charge to cover events occurring after October 27, 1992, nor did he file any subsequent EEOC charge.

On or about April 16, 1993, ten days before the expiration of his six-month short-term disability leave, Plaintiff signed a long-term disability claim form, which stated that he expected to be unable to work for "approximately one year."[13] Plaintiff's psychiatrist, Dr. Patterson, signed an "Attending Physician's Statement" indicating that Plaintiff suffered from dysthymic disorder.[14] Dr. Patterson stated that Plaintiff was "able to engage in only limited stress situations and engage in only limited interpersonal relations" and predicted that maximum improvement would not be

[13] Ex. 13, Aetna Long-Term Disability Employer's/Employee's Statement.

[14] Ex. 10, Aetna Attending Physician's Statement, signed by Dr. Daniel Patterson, April 15, 1993.

reached for a year.[15] These forms were submitted by Plaintiff to Cape Industries human resources department, to be forwarded to Aetna, Cape Industries' disability carrier.

Within a few days of submitting his long-term disability application, Plaintiff submitted a Return From Personal Illness form signed by Dr. Patterson which -- contrary to the earlier documents -- stated that Plaintiff could return to work on April 26, 1993 with no restrictions.[16] Understandably confused by these conflicting reports, Cape Industries sought clarification from Dr. Patterson.

On April 23, 1993, Dr. Patterson wrote to Dr. Howard Armistead (a private physician in Wilmington who also served as the company physician) that Plaintiff was no longer making suicidal or homicidal statements and that his depression had improved to the point where he could

return to his former employment, but apparently not his prior position. Dr. Patterson wrote:

> Let me state . . . that I still feel the patient's prognosis is guarded and I am indeed concerned about the patient's returning to his previous position as we discussed previously.

Ex. 9, Letter from Dr. Patterson to Dr. Armistead, April 23, 1993.

Based on this information from Plaintiff's own psychiatrist showing that he was not yet able to return to his previous position, Cape Industries informed Plaintiff that they would go forward with the long-term disability claim that had already been submitted.[17] Plaintiff was further informed that he would be terminated effective April 27, 1993, since the company policy

[15] Id.

[16] Ex. 14, Return From Personal Illness form, April 19, 1993.

[17] Ex. 15, Letter from Mr. Neal to Mr. Jackson, April 27, 1993.

was to terminate a person at the end of their short-term disability unless the person was able to return to work or a long-term disability claim had been approved. [18]

Plaintiff's long term disability claim was initially denied by Aetna, but he subsequently obtained counsel to pursue an appeal. With the assistance of counsel and a new psychiatrist, Dr. John Parkinson, Plaintiff was successful in obtaining a reversal of the decision. On December 6, 1993, Aetna wrote to Plaintiff that he was considered "totally disabled" from his "usual occupation" from April 27, 1993 forward.[19] Following that decision, Plaintiff received back benefits from April 27, 1993, and has continued to receive benefits since that time.

Since October 27, 1994, Plaintiff has qualified for benefits from Aetna under the more stringent test of total disability for "any occupation."[20] In addition to his disability benefits from Aetna, Plaintiff receives disability benefits from Northwestern Mutual Life Insurance Company (through a private disability insurance policy) and from the U.S. Social Security Administration.[21] Plaintiff has stated in discovery that he receives $3,903 per month from these three sources of disability insurance payments.[22] Further, his family receives an additional $615 per month from

[18] Id. See also Ex. 16, Employee Transaction/Status Form, April 27, 1993.

[19] Ex. 17, Letter from Mr. McSweeney to Mr. Jackson, December 6, 1993. Upon approval of Plaintiffs long term-disability claim, Defendants "reinstated" him, effective April 27, 1993, as an employee on long-term disability. Ex. 18, Employee Transaction/Status Form, signed December 20, 1993. Pursuant to company policy, Defendants terminated Plaintiff on October 27, 1994, after he had been on leave status for two years with no prospect of return due to his psychiatric condition. Ex. 19, Employee Transaction/Status Form, October 27, 1994.

[20] Ex. 17, Letter from Mr. McSweeney to Mr. Jackson, December 6, 1993.

[21] Ex. 20, Letter from Ms. Braxton to Mr. Jackon, October 25, 1993; Ex. 21, Social Security Administration Decision, February 22, 1995.

[22] Ex. 11, Plaintiffs Second Amended Response to Defendants' First Set of Interrogatories (Response No.10). The disability benefits from Northwestern Mutual and Social Security have been awarded retroactive to May 1993. Id.

Social Security due to his disability.[23] Thus, Plaintiff and his family receive approximately $54,200 per year through various payments arising out of his disability.[24]

On January 18, 1994, the EEOC issued a determination that there was no cause to find a violation of Title VII of the Civil Rights Act of 1964. The EEOC found no evidence to support Plaintiff's charge that he was given a greater work load than his white counterparts. As to other matters of concern regarding terms and conditions of employment, the EEOC found that "these were either untimely or not Title VII related."[25]

Plaintiff later challenged the decision on procedural grounds, and the EEOC agreed to reconsider the matter on December 2, 1994.[26] Before the EEOC could reach another determination, Plaintiff requested a notice of right to sue from the EEOC, which was issued on August31, 1995.[27]

Plaintiff initiated this action on December 1, 1995 with the filing of a Summons and Complaint against "Hoechst Celanese of Wilmington (formerly Cape Industries)," which he never served. On December 12, 1995, Plaintiff filed and subsequently served an Amended Complaint naming the current Defendants as parties. Plaintiff has alleged that he was discriminated against

[23] Ex. 22, Letter from Ms. DiFiore to Mr. Jackson, August 10, 1995; Ex. 23, Jackson Dep. at 204-205. Relevant pages of Plaintiffs deposition are attached as an exhibit hereto. The full transcript is an exhibit to Defendants' Motion to Dismiss and for Sanctions filed on August 20, 1996.

[24] Since most of this money is not reportable as taxable income, the net amount that Mr. Jackson's family receives approximates or exceeds the post-tax income he would receive from his salary at Cape Industries. See 26 U.S.C. § 105.

[25] Ex. 24, EEOC Determination, January 18, 1994.

[26] Ex. 25, EEOC Notice of Intent to Reconsider, December 2, 1994.

[27] Ex. 26, Notice of Right to Sue, August 31, 1995.

on the basis of race by Cape Industries, with the discrimination alleged to have occurred from April 1, 1992 through October 27, 1992.[28] Plaintiff's sole claim is brought pursuant to Title VII for recovery of back pay arising out of the discrimination alleged in his February 1, 1993 EEOC charge.[29]

DISCUSSION

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986).

The summary judgment hurdle is not insurmountable in employment discrimination actions. Ballinger v. North Carolina Agricultural Extension Serv., 815 F.2d 1001, 1005 (4th Cir.), cert. denied, 484 U.S. 897, 108 S.Ct. 232, 98 L.Ed.2d 191(1987). The Fourth Circuit has stated that "[o]rdinarily, Title VII claims that are plainly meritless should be disposed of early in the course of litigation through summary judgment or other pretrial motion." Blue v. U.S. Dept. of Army, 914 F.2d 525, 535 (4th Cir. 1990), cert. denied, 499 U.S. 959, 111 S.Ct. 1580, 113 L.Ed.2d 645 (1991). In order to overcome a motion for summary judgment, "the non-moving party must. . . establish the existence of a genuine issue of material fact by presenting evidence on which a jury could reasonably find in his favor." Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963, 965 (E.D.N.C. 1994).

[28] Amended Complaint, ¶ 8.

[29] Amended Complaint, ¶ 12.

Where, as here, "the evidence from the entire record could not lead a rational fact-finder to find for the non-moving party, no genuine issue for trial exists and summary judgment is appropriate." A.L. Green & Co. v. Great-West Life Assurance Co., 738 F. Supp. 965, 969 (W.D.N.C. 1990).

I. JUDGMENT SHOULD BE ENTERED IN FAVOR OF DEFENDANTS AS A MATTER OF LAW, SINCE PLAINTIFF WAS NOT SUBJECT TO ANY ADVERSE EMPLOYMENT ACTION

A. A prima facie case under Title VII requires a showing of an adverse employment action.

An essential element of a prima facie case under Title VII is that the plaintiff must show that he was subjected to an adverse employment action. See, e.g. Bristow v. Daily Press, Inc. 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082,

106 S.Ct. 1461, 89 L.Ed.2d 718 (1986)("The employment discrimination laws require as an absolute precondition to suit that some adverse employment action have occurred."); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 238 (4th Cir. 1982)(substantive elements of a claim include that the employee "has suffered an unfavorable employment action").

In determining what constitutes an adverse employment action, courts have "consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." Page v. Bolger, 645 F.2d 227, 233 (4th Cir.), cert. denied, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981). In an en banc decision, the Fourth Circuit has stated that "it is obvious to us that there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions. . . of Title VII." Id.

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Similarly, in Crady v. Liberty National Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993), the Seventh Circuit held that in order to make out a prima facie case of discrimination, a plaintiff must show a "materially adverse change in the terms and

conditions of employment" which is "more disruptive than a mere inconvenience or an alteration of job responsibilities." The Court held that an adverse employment action would be "indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." Id.

Summary judgment must be granted where a plaintiff cannot show that there has been any action taken against him which rises to the level of an adverse employment action. See e.g., Devine v Thalhimers, 1992 U.S. App. LEXIS 27496 (4th Cir. 1992) (affirming summary judgment where plaintiff "failed to show that she suffered an adverse employment decision and therefore could not establish a prima facie case of employment discrimination"); Caussade v. Brown, 924 F. Supp. 693 (D. Md. 1996) (alleged actions which included disparaging statements and reassignment to a position without an office were insufficient to make a prima facie showing of an adverse employment action); Hopkins v. Baltimore Gas & Electric Co., 871 F. Supp. 822, 836 (D. Md. 1994), aff'd, 77 F.3d 745 (4th Cir. 1996) (allegedly abusive verbal comments and formal written warning that resulted in no further disciplinary action did not constitute adverse employment actions); Keegan v. Dalton, 899 F. Supp. 1503, 1511 (E.D. Va. 1995) (where plaintiff

at best alleged that her supervisors erected minor hindrances to the timely accomplishment of her job, there was no showing of an adverse employment action); Ward v. Johns Hopkins University, 861 F. Supp. 367, 377 (D. Md. 1994) (allegations that supervisor ceased speaking with employee and gave her less favorable assignments do not amount to adverse employment actions as a matter

of law); Lucas v. Cheney, 821 F. Supp. 374, 375 (D. Md. 1992), aff'd, 991 F.2d 470 (4th Cir. 1993)(neither threat by superior nor letters of reprimand constituted adverse employment decisions).

B. Plaintiff has failed to show any adverse employment action, since he left work due to a disability and there is no evidence that alleged discrimination caused his disability.

In the present case, Plaintiff has failed to show that he was subject to any adverse employment action by Cape Industries from April 1, 1992 to October 27.1992, the period of time during which he alleged in his Amended Complaint that the discrimination occurred. It is undisputed that Plaintiff continued to work as a Senior Process Engineer -- with undiminished hours, pay level, and benefits -- until he left to go on disability leave. The

alleged discriminatory actions that Plaintiff has identified in discovery responses do not, as a matter of law, constitute adverse employment actions.[30] Rather, Plaintiff has merely described comments from supervisors about his performance, none of which led to any adverse employment action.

In an attempt to create an appearance of some adverse action by Cape Industries, Plaintiff has alleged in his Amended Complaint:

> [H]arassment and discriminatory terms and conditions caused me to go into depression. Consequently, I have been on disability since October 27, 1992.

Amended Complaint, ¶ 9 (emphasis added).

According to Plaintiff, therefore, the alleged "adverse action" is that Cape Industries caused his depression and resulting disability leave. However, this allegation too must fail, since

[30] See Ex. 27, Plaintiffs Response to Defendants' Second Set of Interrogatories (Response No. 12). Plaintiffs allegations regarding his termination on April 27, 1993 (which was later rescinded) and denial of bonus and pay increases in April 1993 are beyond the scope of his EEOC charge and Amended

Complaint, and should not be considered in this case. See Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Compel Discovery, at 5-8.

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Plaintiff has come forward with no evidence which could support a jury verdict that alleged racial discrimination at Cape Industries caused the psychiatric illness that has prevented him from working since October 27, 1992.[31]

Plaintiff has been diagnosed with a number of psychiatric problems -- none of which have been linked by any witness to alleged discrimination at Cape Industries. For example:

- On October 27, 1992, Plaintiff was diagnosed by Dr. Daniel Patterson as suffering from "Major depression, single episode."[32]

- On April 15, 1993, Dr. Patterson indicated that Plaintiff's diagnosis was dysthymic disorder.[33]

- On October 23, 1995, Dr. Bob Rollins diagnosed Plaintiff as having a mixed personality disorder, and could not rule out schizophrenia and substance abuse.[34]

- As recently as January 12, 1996, Dr. John Parkinson diagnosed Plaintiff as having impulse control disorder, adjustment disorder with mixed response, mixed personality disorder, and symptoms which did not allow him to rule out paranoid disorder.[35]

Although proof that Plaintiff's disability was caused by alleged racial discrimination at Cape Industries is crucial to his claim that he was subjected to an "adverse employment action" on account of his race, Plaintiff has failed to come forward with any evidence whatsoever on this issue.

[31] Compare, Blistein v. St. John's College, 74 F.3d 1459, 1470 (4th Cir. 1996)(no prima facie case of discrimination where plaintiff "wholly failed to proffer evidence that . . . his continued employment [was] intolerable or that his departure was anything other than voluntary").

[32] Ex. 28, Psychiatric Evaluation of Daniel Y. Patterson, M.D., October 27, 1992.

[33] Ex. 10, Aetna Attending Physician's Statement, signed by Dr. Daniel Patterson, April 15, 1993.

[34] Ex. 29, Psychiatric Evaluation of Bob Rollins, M.D., P.A., October 23, 1995.

[35] Ex. 30, Northwestern Attending Physician's Statement, signed by Dr. John Parkinson, January 12, 1996.

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Plaintiff is certainly aware that he will need expert medical testimony to prove that his psychiatric illness was caused by alleged discrimination, since he testified at his deposition that he was not qualified to give any opinion regarding the cause of the conditions with which he has been diagnosed:

> Q:Is the cause of a dysthymic disorder something that. . . you're not qualified to talk about?
>
> A: Absolutely. I feel absolutely that I'm not qualified to talk about the cause and effect and so forth and the intricacies of dysthymic disorder. That's outside of my field.
>
> Q: Is the cause of impulse disorder or adjustment disorder something that you don't feel qualified to talk about?
>
> A: I am not qualified to talk about that. I have a doctor who is qualified to talk about that.

Q: What about the cause of depression. Is that something that you feel qualified to talk about?

A: No, I'm not qualified to talk about that, but I'm going to have to defer that to my current doctor who is very well qualified to talk about that in my particular case.

Q: Is the cause of a paranoid disorder something that you feel qualified to talk about?

A: I am not qualified to talk about paranoid disorder or any of those other disorders.

Q: Is the cause of a mixed personality disorder something that you feel qualified to talk about?

A: Nope. No I'm not.

Ex. 23, Jackson Dep. at 179-181.

However, during discovery, Plaintiff has not properly identified any medical or expert witness that he plans to use if this case goes to trial. The Court entered an initial scheduling

Order stating that reports from retained experts under Rule 26(a)(2) were due from Plaintiff by June 17, 1996, and supplementation of discovery under Rule 26(e) was due by August 19, 1996.[36] Yet, in response to interrogatories served by Defendants, Plaintiff has not identified any expert witnesses that he plans to use at the trial of this action.[37] Nor has Plaintiff disclosed any reports of retained experts pursuant to Rule 26(a)(2), as the scheduling Order required him to do by June 17 if he intended to offer expert testimony at trial. Moreover, in response to Defendants' interrogatories, Plaintiff has not listed any of his treating medical care providers as persons with knowledge regarding the matters alleged in this lawsuit, with the exception of Dr. Daniel Patterson, who was listed only as having "general knowledge of the Plaintiffs work environment and Defendants' desire to terminate Plaintiff ."[38]

With discovery now complete, there is simply no evidence that Plaintiff has identified to support his claim that alleged racial discrimination caused his extended disability leave.

[36] Order, February 16, 1996.

[37] Ex. 31, Amended Plaintiff's Response to Defendants' First Set of Interrogatories (Response No.17).

[38] Id., Response Nos. 15-16. Plaintiff implied during his deposition that he may wish to offer the expert testimony of his current psychiatrist, Dr. James Carter, and he has stated in a recent letter that he intends to call Dr. Patterson as an expert witness. However, any attempt by Plaintiff to offer expert testimony from Dr. Carter or Dr. Patterson should be barred on the grounds that (a) Plaintiff failed to identify potential experts within the discovery schedule set by the Court, and (b) Plaintiff has still not provided any information about the substance or basis of the opinions to be expressed by any purported experts. See Fed.R.Civ.P. 26(a)(2). The issue of Plaintiff's failure to comply with the discovery rules regarding expert testimony is before the Court on Defendants' Motion to Dismiss and for Sanctions, filed on August 20, 1996.

C. The available psychiatric evidence shows that Plaintitt's allegations of discrimination are not reliable and that Plaintiff's psychiatric problems were caused by factors unrelated to alleged discrimination at Cape Industries.

In fact, the evidence of record is to the contrary and shows that Plaintiff's disability was caused by other factors such as events earlier in his life or general workplace stresses unrelated to alleged discrimination. According to the treatment and evaluation notes of psychiatrists and psychologists that have examined Plaintiff, there is no evidence that Plaintiff's current problems were caused by alleged discrimination at Cape Industries. Moreover, Plaintiff's own psychiatrists cast doubt on the reliability of Plaintiff's claims of pervasive discrimination.

Dr. Bob Rollins, a psychiatrist who interviewed Plaintiff on October 22, 1995 as part of an independent psychiatric evaluation for Plaintiffs disability coverage, stated the following regarding the cause of Plaintiffs problems:

> Mr. Jackson graduated from high school in 1976 and attended the University of Delaware on an academic scholarship. . . . He relates that he was racially harassed by teachers and others. After graduation from college in 1981, he worked for DuPont from 1982-88. He continued to encounter racism. .
>
> Mr. Jackson left DuPont because of racism and worked for

General Electric from 1988-91. He continued to experience racism and left to work for Cape Industries. .

Mr. Jackson is a poor and likely unreliable historian.... By his account Mr. Jackson has been victimized by racism during college and in all his jobs. .

Mr. Jackson is vigilant, paranoid and attributes all his problems to others. . . . [H]e appears to have limited interpersonal skills and unmet dependency needs.....

At this time Mr. Jackson is disabled in that he is unable to perform the principal duties of his occupation in that he is unable to work with others. This, however, is a longstanding pattern. Had he not been referred to a psychiatrist and the issue of work place violence not been raised, he might have simply changed jobs, as he had done previously. It is not clear that his difficulties at Cape Industries are significantly greater than his difficulties on his two previous jobs....

> My diagnosis is mixed personality disorder with paranoid, emotionally unstable, and dependent features. Schizophrenia is not ruled out. These maladaptive personality traits result from adverse experiences during his developmental years. Certainly, Mr. Jackson contributes to some extent, and likely a great extent, to the work place problems he has experienced, although he does not accept this. . . . Mr. Jackson attributes all of [his] problems to racism.

Ex. 29, Psychiatric Evaluation of Warren Jackson by Bob Rollins, M.D., P.A., 10/23/95 (emphasis added).

Similarly, the notes of Dr. Elaine Crovitz (a Duke psychologist who performed tests in conjunction with Dr. James Carter, Plaintiffs current psychiatrist) show that Plaintiffs current problems relate to personality issues unrelated to alleged discrimination. Dr. Crovitz's March 27, 1996 note states:

> The personality organization of this patient is somewhat less mature than might be expected; thus even though no problems in control are evident, people

> such as this patient are more susceptible to disorganization by many of the stresses of living in a complex society. He is likely to experience feelings more intensively than others, and sometimes, will have more difficulty in bringing closure to emotional situations.
>
> The psychological structure of the patient is marked by a distinct hypervigilant style, an anticipatory state which has its origins in a mistrusting attitude toward the environment....
>
> Instances of ideational discontinuity and/or faulty conceptualization occur frequently, tend to interfere with logic and promote faulty judgment

Ex. 32, Medical Psychology Consultation, Elaine Crovitz, Ph.D., 3/27/96 (emphasis added).

Dr. Parkinson, who saw Plaintiff as a patient for several years, described Plaintiff as exhibiting "an extremely high degree of alienation, suspicion, paranoia and feelings of victimization.[39] Dr. Parkinson stated that Plaintiff was unable to work not because of alleged

[39]Ex. 33, Letter from Dr. Parkinson to Mr. McSweeney, March 15, 1994.

discrimination, but because of "his inability to relate normally, trustingly, and cooperatively with others."

Dr. Patterson, who was the first psychiatrist to see Plaintiff after he began his disability leave, wrote in a letter dated March 1, 1993:

> It is my opinion at this time that Mr. Jackson should not return to his former position with Cape Industries, and indeed I am recommending that he seek employment outside the petrochemical industry.

Ex. 9, Letter from Dr. Patterson to Dr. Armistead, March 1, 1993. This letter clearly shows that Dr. Patterson believed that Plaintiff's problems were linked to stresses that would be present in any engineering job in the petrochemical industry. If Dr. Patterson had believed that Plaintiff's condition was the result of unlawful racial discrimination at Cape Industries, surely he would have encouraged Plaintiff to seek employment at another company within his chosen field, rather than advising him to leave the petrochemical industry altogether.[40]

Since it appears from the evidence of record that Plaintiff was subject to no adverse employment action and that his disability leave was caused by factors other than alleged discrimination, Plaintiff should not be permitted to proceed with his Title VII claim.

II. EVEN IF PLAINTIFF COULD ESTABLISH A PRIMA FACIE CLAIM OF DISCRIMINATION, HE HAS NOT FORECAST EVIDENCE TO CARRY HIS ULTIMATE BURDEN OF PROVING DISCRIMINATORY TREATMENT.

Even assuming that Plaintiff were able to make out the elements of a prima facie case, Plaintiff would be unable to carry his "ultimate burden of proving that the employer intentionally discriminated against him." Cook v. CSX Transportation Corp., 988 F.2d 507, 511(4th Cir.

[40] Problems caused by generally stressful conditions unrelated to alleged discrimination will not give rise to a claim under Title VII. See Bristow, 770 F.2d at 1255 (under federal employment discrimination laws, Plaintiff "is not. . . guaranteed a working environment free of stress").

1993). See also Blue v. U.S. Dept. of Army, 914 F.2d at 535 ("The cases in which summary judgment has been granted a Title VII defendant, even after plaintiff was able to establish a prima facie case of discrimination, are numerous.").[41]

In order to avoid summary judgment, a plaintiff must come forward with facts sufficient to support a jury verdict in his favor. See Mitchell v. Data General Corp., 12 F.3d 1310, 1315-1316 (4th Cir. 1993). The "summary judgment procedure allows the court to forecast the proof at trial to determine whether consequential facts are in dispute, and if not, to resolve the case without a trial." Id. at 1316. The non-movant "cannot create a genuine issue of fact through mere speculation or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4thCir. 1985).

Here, viewing Plaintiff's allegations in the most favorable light, Plaintiff alleges that he was hired in October 1991 and that approximately six months later, Cape Industries embarked on a series of racially discriminatory actions which caused him to become depressed and permanently disabled. However, Plaintiff lacks any facts which could overcome the strong presumption in this Circuit that actions taken against recently-hired members of protected classes will not generally support an intentional discrimination claim.

In Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991), the Fourth Circuit observed that it hardly makes sense to hire workers from a group one dislikes with the intention of discriminating against them once they are on the job. Therefore, where there is a relatively short time span

[41] Defendants have come forward with evidence sufficient to show that their actions were based on legitimate business purposes and to rebut any inference of discrimination. See Ex. 34, Letter from Mr. Rasile to EEOC, March 4, 1993; Ex. 35, Letter from Mr. Rasile to EEOC, February 1, 1995; Ex. 36, Letter from Mr. Neal to EEOC, April 6, 1995; Ex. 24, EEOC Determination, January 18, 1994.

between hiring and the alleged discrimination, "a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." Id. See also Tyndall v. National Educ. Centers Inc. of California, 31 F.3d 209, 214-215 (4th Cir. 1994); Mitchell v. Data General Corp., 12F.3d at 1318.

In the present case, Plaintiff has offered no evidence other than unsupported inference and his own belief that he was the victim of racial discrimination. However, Plaintiff's "own naked

opinion, without more, is not enough" to prove that discrimination occurred. Evans v. Technologies Applications & Service, 80 F.3d 954, 959 (4th Cir. 1996); Goldberg v. B. Green & Co., 836 F.2d 845, 848 (4th Cir. 1988). "It is well established that in discrimination cases, a subjective belief of discrimination, however genuine cannot be the basis of judicial relief" Johnson v. Runyon, 928 F. Supp. 575, 582 (D. Md. 1996)(internal quotations omitted).

Because Plaintiff has not come forward with evidence which would be sufficient to convince a jury that Cape Industries intended to discriminate against him on the basis of race, summary judgment should be granted in favor of the Defendants.

III. TO THE EXTENT THAT PLAINTIFF MAY SEEK TO PURSUE A CLAIM FOR RACIAL HARASSMENT, SUCH A CLAIM FAILS AS A MATTER OF LAW, SINCE PLAINTIFF FAILED TO MAKE ANY ALLEGATIONS OF HARASSMENT IN HIS CHARGE TO THE EEOC AND HAS FAILED TO ALLEGE FACTS TO SUPPORT AN ACTIONABLE HARASSMENT CLAIM

A. Plaintiff did not raise any claim of harassment in his EEOC charge.

Prior to filing a Title VII claim, a claimant must pursue and exhaust administrative remedies with the EEOC. 42 U.S.C. § 2000e-5. The claims which a plaintiff can raise in court are limited by the allegations contained in a timely charge of discrimination filed with the EEOC. See e.g., Dennis v. County of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995)(claims raised under Title VII which exceed the scope of the EEOC charge are procedurally barred); Shah v. Mt. Zion

Hosp. and Medical Ctr., 642 F.2d 268, 271(9th Cir. 1981) ("district court lacked subject matter jurisdiction over these additional claims because [plaintiff] failed to raise them before the EEOC"); Caliendo v. Bentsen, 881 F. Supp. 44, 47 (D.D.C. 1995) (only those Title VII claims raised at the administrative level may be set forth in district court complaint); Saad v. Burns Int'l Sec. Services Inc., 456 F. Supp. 33, 36 (D.D.C. 1978) (plaintiff may not raise in court a basis for employment discrimination claim which was not included in his EEOC charge).

Courts have routinely barred claims of harassment and hostile work environment that are "beyond the scope of the EEOC charge and any reasonable investigation that would follow." Nicol v. Imagematrix Inc., 767 F. Supp. 744, 753 (E.D. Va.

1991). In Park v. Howard University, 71 F.3d 904, 908 (D.C. Cir. 1995), the Court held that a hostile environment harassment claim was barred where the plaintiffs EEOC charge "not only lack[ed) the words 'hostile environment,' but also lack[ed] any factual allegations supporting such a claim. The Court held that a bald allegation that the plaintiff was denied opportunities because of his national origin "cannot be read to encompass a hostile work environment claim." Id. See also Riley v. Technical and Management Services Corp., 872 F. Supp. 1454, 1459 (D. Md. 1995), aff'd, 79 F.3d 1141 (4th Cir. 1996) (granting summary judgment for defendant on harassment claims, where there was no mention of a hostile work environment or harassment of any kind in EEOC charges).

Similarly, in Rush v. McDonald's Corp., 966 F.2d 1104, 1111(7th Cir. 1992), the Court held that "[s]ome detail beyond a statement that 'I believe I have been discriminated against because of my race, Black' is necessary to allow the agency to perform its statutory duty" with regard to a purported harassment claim. In holding that general allegations in an EEOC charge of disparate treatment on grounds of race were insufficient to preserve the right to sue in court for alleged racial harassment, the Court noted:

> [T]he goals behind the requirement of prior resort to administrative relief would be frustrated if the filing of a general charge with the EEOC would open up the possibility of judicial challenges to any related conduct that took place in connection with the employment relationship.

Id., at 1110.

As in the above cases, Plaintiff failed to make any allegations of racial harassment to the EEOC. Neither Plaintiff's charge[42] nor the affidavit he submitted in support of his charge[43] state that Plaintiff was racially harassed or that the environment at Cape Industries was a hostile one. Plaintiffs claims that he was "subjected to different terms and conditions" and "treated differently" on the basis of race are insufficient, as a matter of law, to put the EEOC on notice that it should have considered Plaintiff's charge to be a racial harassment/hostile environment claim. Plaintiff's harassment claim should therefore be barred as beyond the scope of the charge of discrimination he submitted to the EEOC.

B. Plaintiff has failed to allege facts which could support a claim for actionable harassment.

Moreover, it appears from the Plaintiff's discovery responses that he is using the term "harassment" in layman's terms rather than as that term has been defined by case law under Title VII. Plaintiff's description of the alleged acts of discrimination he believes have occurred do not include any allegations of conduct typically found in harassment cases, such as pervasive use of racial epithets or racial jokes in the work environment.[44] Plaintiffs allegations do not, as a matter

[42]Ex. 12, Charge of Discrimination.

[43] Ex. 37, Affidavit of Warren I. Jackson to New Hanover Human Relations Commission, February 1, 1993.

[44]See Ex. 27, Plaintiff's Response to Defendants' Second Set of Interrogatories (Response No. 12).

of law, rise to the level of actionable racial harassment under Title VII. See, e.g., Thomas v. Shoney's, Inc., 845 F. Supp. 388, 391-392 (D.W.Va. 1994), aff'd, 60 F.3d 825 (1995) (despite the benefit of all reasonable inferences, plaintiff failed to meet the standard for actionable racial harassment under Title VII); Hampton v Conso Products Inc., 808 F.

Supp. 1227, 1236 (D.S.C. 1992) (More than occasional or sporadic uses of racial slurs or epithets are necessary to support an actionable claim of racial harassment under Title VII; "no reasonable trier of fact could determine that the five alleged incidents involving racial slurs satisfied the objective element of the severe/pervasive' criteria.").

Accordingly, Plaintiffs purported claim for harassment fails as a matter of law.

IV. JUDGMENT SHOULD BE ENTERED IN FAVOR OF DEFENDANTS, SINCE PLAINTIFF FAILED TO FILE AN EEOC CHARGE WITHIN 180 DAYS OF BECOMING AWARE OF THE FACTS UPON WHICH HIS CLAIM IS BASED

A. Plaintiff Cannot Pursue a Title VII Claim in Court Where He Has Failed to File a Timely Charge of Discrimination With the EEOC.

In order to preserve a claim under Title VII, an employee must file a charge of discrimination with the EEOC within 180 days after an alleged unlawful employment practice occurs. 42 U.S.C. § 2000e-5(e). Any act occurring more than 180 days prior to filing of an EEOC charge "is merely an unfortunate event in history which has no present legal consequences."

United Air Lines v. Evans, 431 U.S. 553, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977).

The 180-day period begins to run from the date of the alleged discriminatory act giving rise to a charge, even though the effects of the discriminatory act may not be felt until some later date. Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S.Ct. 498, 504, 66 L.Ed.2d 431 (1980). "[T]he proper focus is upon the time of the discriminatory acts, not when the

consequences of the acts become most painful." Id. (emphasis in original). The Fourth Circuit has held that "Congress meant what it plainly and unequivocally said in the Act, that all charges of . . .discrimination shall be filed within 180 days of the occurrence of the alleged violation." Hamilton v.1st Source Bank, 928 F.2d 86, 87 (4th Cir. 1990) (emphasis in original; interpreting similar 180-day filing requirement in ADEA). See also English v. Whitfield, 858 F.2d 957, 961 (4th Cir. 1988) (180-day period under Title VII begins running when the employee has notice of the challenged decision, rather than the time that the effects of the decision are ultimately felt); Price v. Litton Business Systems Inc., 694 F.2d 963, 965 (4th Cir. 1982) (charge filed more than 180 days after adverse decision was time-barred).

This district has previously held that it was without jurisdiction to rule on claims of discrimination based upon events alleged to have occurred more than 180 days prior to the filing of an EEOC charge. See Grissett v. W.R. Grace and Company, 26 Empl. Prac. Dec. (CCH) ¶ 31,918 (E.D.N.C. 1981), citing, King v Seaboard Coast Line Railroad Company, 538 F.2d 581 (4th Cir. 1976).

B. Plaintiff Has Admitted That He Was Aware of the Basis of His Discrimination Claim More Than 180 Days Prior to Filing an EEOC Charge.

Accepting Plaintiff's factual allegations and testimony as true for the purposes of the pending summary judgment motion, it is clear that Plaintiff believed he had a basis for filing a charge of discrimination with the EEOC by July 27, 1992, yet he failed to file any charge with the EEOC until February 2, 1993, more than 180 days later. Accordingly, his claim should be barred as untimely.

Plaintiff has alleged that the discrimination against him began on April 27, 1992, after a discussion within the process engineering group at Cape Industries on whether to hire a black,

female engineering candidate, Crystal Turner.[45] Plaintiff supported Ms. Turner, and she was in fact hired. However, Plaintiff states that he was told by his direct supervisor, Miguel Chen, that he should not have given such vocal support to Ms. Turner. Plaintiff believes that his support of Ms. Turner resulted in close scrutiny and criticism of his work, and a negative mid-term performance evaluation on July 27, 1992.[46]

Plaintiff testified that he first began to contemplate filing a charge with the EEOC or the Wilmington Human Relations Commission after the April 27, 1992 meeting regarding the hiring of Ms. Turner.[47] He again considered filing a charge of discrimination after he was criticized for being late for a 2 p.m. meeting on May 19, 1992. Plaintiff is certain that he was considering a charge by that date, since he "began to keep. . . notes" to support a discrimination claim.[48]

Plaintiff believed by May 1992 that recommendations he made as an engineer were not being followed because he was black.[49] In late May 1992, Plaintiff approached his second level supervisor, William King, with complaints about comments that Plaintiff felt paralleled racial stereotypes of blacks.[50] In June 1992, Plaintiff states that he was told by Mr. Chen that he couldn't assign Ms. Turner to assist him because both were

black, a comment that Plaintiff stated was not only evidence of discrimination, but was itself race discrimination.[51]

[45]Ex. 23, Jackson Dep. at 30-35.

[46] See generally Ex. 23, Jackson Dep. at 35-79.

[47]Ex. 23, Jackson Dep. at 40-41.

[48]Ex. 23, Jackson Dep. at 40.

[49]Ex. 23, Jackson Dep. at 53-57.

[50]Ex. 23, Jackson Dep. at 61-62.

[51]Ex. 23, Jackson Dep. at 84-85.

Plaintiff testified unequivocally about his awareness of what he perceived as unlawful discrimination:

> Q: Let me just make sure I understand your answer. So you are saying that by late May or early June 1992, this [discrimination] was beginning to affect you personally, and it was beginning to affect your career. Is that what you're saying?

A: Absolutely.

Ex. 23, Jackson Dep. at 64.

By the time of the July 4, 1992 holiday weekend, Plaintiff felt that he had to take time away from work to remove himself from what he characterized as a "hostile" environment.[52] He again considered making a formal claim of discrimination to the EEOC or the Wilmington Human Relations Commission.[53]

Plaintiff testified that he "knew that the race card was in it" for certain when he received his mid-year performance evaluation from Mr. Chen on July 27, 1992.[54] Plaintiff believed that his mid-year review was confirmation of his observations that he "was being treated differently on the basis of [his] race."[55] According to Plaintiff, he then "highlighted to management . . . the racial bias that resulted and is evident in that midyear review."[56] Plaintiff believed that his July 27, 1992

[52]Ex. 23, Jackson Dep. at 67, 69-71.

[53]Ex. 23, Jackson Dep. at 67.

[54]Ex. 23, Jackson Dep. at 68.

[55]Ex. 23, Jackson Dep. at 77.

[56] Ex. 23, Jackson Dep. at 79.

review was outside the Defendants' own policies and revealed "disparat[e] treatment based on race."[57]

Despite Plaintiff's clear testimony that he believed by July 27, 1992 that he had been adversely affected by racially biased treatment, and that he had repeatedly considered filing a formal discrimination claim, it is undisputed that Plaintiff did not file any charge with the EEOC until more than 180 days later, on February 2, 1993.[58] Plaintiff thus failed to initiate administrative proceedings within 180 days after becoming aware of the alleged discriminatory events, as required by Title VII.

Plaintiff's discrimination claim should therefore be barred for failure to meet the administrative filing requirements.

CONCLUSION

Based on the foregoing, Defendants request that their Motion for Summary Judgment be granted.

[57]Ex. 23, Jackson Dep. at 113-114.

[58]Ex. 12, Charge of Discrimination.

This the 5th day of September, 1996.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO. 7:95-CV-175 F(3)

FILED OCT 15 1996
DAVID W. DANIEL,CLERK
U.S.DISTRICT COURT
E. DIST. NO. CAR.

WARREN I. JACKSON,
Plaintiff,

v.

NCT CORPORATION and PFS CORPORATION, a joint venture DBA "HOECHST CELANESE POLYESTER INTERMEDIATES",

Defendants.

REPLY BRIEF SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff's response brief fails to present either evidence or legal arguments which would preclude the entry of summary judgment in favor of

Defendants as a matter of law. Plaintiff has attempted to confuse the Court with a misleading factual presentation and by references to allegations outside the scope of his EEOC charge -- all in a vain effort to satisfy the threshold requirements of a prima facie case. However, Plaintiff's claim cannot survive, since the evidence of record simply does not support a finding that he was subject to any adverse employment action. Moreover, alleged adverse actions that may have occurred after the dates covered by Plaintiff's EEOC charge are irrelevant to the question of whether Plaintiff has made out a prima facie case in this lawsuit.

Additionally, Plaintiff has failed to present evidence to overcome Defendants' other arguments in favor of summary judgment. First, even if Plaintiff could establish a prima facie case, he has failed to present evidence which would be sufficient to carry his ultimate burden of proving discriminatory treatment. Second, Plaintiff's allegations of "harassment" are outside the scope of his EEOC charge and, in any case, fall short of the legal requirements for actionable harassment. Third, according to Plaintiff's own deposition testimony, he failed to file any EEOC charge within 180 days of his awareness of the facts upon which his claim is based.[1]

I. PLAINTIFF WAS NOT SUBJECT TO ANY ADVERSE EMPLOYMENT ACTION

As Defendants have previously asserted, Plaintiff has failed to show that he was subject to any adverse employment action, which is a essential element of a prima facie case. See generally Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 9-17. Plaintiff makes two arguments in an attempt to show that he was subject to an adverse employment action. First, Plaintiff repeats his claim that alleged discrimination caused his disability. Second, Plaintiff alleges that he was given a performance rating of "Requires Improvement," and that such a rating constituted an adverse employment action. However, both of these arguments are contrary to the factual record and cannot, therefore, support Plaintiffs prima facie case.

A. There is no evidence that Plaintiff's disability was caused by alleged discrimination.

Plaintiff claims that there is "ample evidence in the record from which a reasonable trier of fact could conclude that Plaintiff's depression was caused by the treatment he received on his job."[2] Yet the only evidence he cites to support his claim is "the form signed by Dr. Daniel Patterson which states that his depression was caused by his job."[3]

[1]Defendants have not attempted to set out every instance where they disagree with Plaintiffs

presentation of "facts," where these differences are not material to the pending motion. For example, Defendants disagree with Plaintiffs description of events from 1993 (Response Brief at 7-8), but this disagreement is immaterial as a matter of law, since Plaintiff's EEOC charge covered discrimination only through October 27, 1992. See Ex. 12, Charge of Discrimination.

[2]Response Brief at 12.

[3] Id. at 13. The other "evidence" Plaintiff points to in support of his claim consists of alleged criticism of Plaintiff's behavior. Id. at 12-14. Plaintiff's allegation that he was criticized by his supervisors at Cape Industries, even if true, would not show that his depression was caused by alleged discrimination.

2

It is not clear which "form" Plaintiff is referring to, since Exhibit E cited by Plaintiff contains an affidavit and two attached documents. Dr. Patterson never states in any of those documents that Plaintiffs depression was caused by alleged discrimination at Cape Industries. In fact, Dr. Patterson stated in a June 18, 1993 letter (submitted by Plaintiff as part of his Exhibit E and by Defendants as Exhibit 9):

> I am recommending that he [Mr. Jackson] seek employment outside of the petrochemical industry.

The fact that Dr. Patterson recommended that Plaintiff leave the petrochemical industry demonstrates conclusively that Dr. Patterson believed Plaintiffs problems were caused by general conditions that would be present in any job in the industry, rather than by alleged unlawful discrimination occurring at Cape Industries. Dr. Patterson's apparent belief that Plaintiffs condition was in some way related to his work environment at Cape Industries thus reflects general concern for Plaintiff's ability to function in any engineering job in the petrochemical industry. None of Dr. Patterson's statements can be interpreted as an opinion that Plaintiffs depression was caused by alleged discrimination.[4]

Further, Plaintiff has made no attempt to address or refute the psychiatric evidence presented by Defendants in support of their motion -- all of which shows that Plaintiffs disability was caused by other factors, such as events earlier in his life or general workplace stresses. See

[4]To the extent that the Court may allow Plaintiff use Dr. Patterson's affidavit or other statements to show that Plaintiff's disability was caused by alleged

mistreatment at Cape Industries, Defendants object to Plaintiff affirmatively offering evidence from Dr. Patterson without answering discovery questions about what he and Dr. Patterson have discussed. Plaintiff has continued to assert -- without legal support-- that he is not obligated to reveal to Defendants the contents of communications with Dr. Patterson that formed the basis for Dr. Patterson's opinions. Additionally, Plaintiff failed to identify Dr. Patterson as an expert witness in this case in a timely or proper manner. These issues are before the Court as part of Defendants' Motion to Dismiss and for Sanctions filed on August 20, 1996. See generally Defendants' Memorandum of Law in Support of Motion to Dismiss and for Sanctions at 8, 17-23.

generally Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 15-17. The evidence from Plaintiff's own psychiatrists showing that Plaintiff's condition was not caused by Cape Industries is overwhelming and undisputed. There is simply no evidence from which a trier of fact could find a causal link between Plaintiffs disability and alleged discrimination.

B. The evidence shows that Plaintiff was not given a rating of "Requires Improvement" during the time period covered by his EEOC charge.

Plaintiff next argues that an adverse employment action occurred when he was given a rating of "Requires Improvement." However, all of the available evidence shows that Plaintiff was not given a "Requires Improvement" rating prior to October 27, 1992, which is the date that he stated in his EEOC charge was the latest date of alleged discrimination.[5] While Plaintiff's performance had deteriorated in his last months of active employment, the undisputed evidence shows that he had not yet been given a "Requires Improvement" rating at the time he went on disability leave.

As shown by the deposition testimony of Plaintiffs direct supervisor, Miguel Chen, a 1992 year-end performance evaluation that would have rated Plaintiff as "Requires Improvement" was prepared in January or February 1993, but was never administered due to Plaintiffs absence from work.[6] According to Roy Neal, who was the Human Resources Section Leader at the time, a "Requires Improvement" performance rating could only be administered after it had been discussed with the employee, which was not possible in Plaintiffs case until he returned to work.[7]

[5] Ex. 12, Charge of Discrimination.

[6]Ex. 38, Chen Dep. at 30-35, 53-54. See also Chen Dep. at 132, where Mr. Chen testified that he sought advice from Human Resources in October 1992 because of the possibility that Plaintiff was "going to end up in that category." It is clear, therefore, that Plaintiff had not yet been given a Requires Improvement rating at that time.

[7] Ex. 39, Neal Dep. at 81.

Likewise, Ken Stach, who was Plaintiff's second line supervisor, explained that the performance review prepared in early 1993 "would have resulted in a Requires Improvement" but was not administered since "the employee was out on leave."[8]

Notwithstanding the undisputed evidence that he had not yet been given a "Requires Improvement" rating in October 1992, Plaintiff misleadingly argues that "an adverse employment action occurred which affected his compensation in October, 1992.[9] However, the "Requires Improvement" rating was not, as Plaintiff argues, "an ultimate decision which adversely affected his compensation in October, 1992."[10] In fact, raises and bonuses were not awarded until after the end of each calendar year, and it was Cape Industry's policy not to give raises or bonuses to an employee on leave until that employee returned to work.[11] Thus, even if a decision had

been made to rate Plaintiff as "Requires Improvement," this would have had no effect on his compensation. Under Cape Industry's policy, Plaintiffs salary would have remained constant and he would not have received a bonus until his return to work, which never occurred.

Moreover, Plaintiff's complaints about not receiving a raise or bonus in 1993 are, as a matter of law, irrelevant to the claims before the Court in this lawsuit. Plaintiff cannot pursue any claims which are beyond the scope of his EEOC charge. Since he stated on the face of his charge that the latest alleged act of discrimination occurred on October 27, 1992,[12] his allegations of events occurring after that date cannot support a prima facie case.

[8] Ex. 40, Stach Dep. at 125 (emphasis added).

[9] Response Brief at 16.

[10]Id.

[11]Ex. 39, Neal Dep. at 78-80.

[12] Ex. 12, Charge of Discrimination.

C. Plaintiff has failed to show that any adverse employment action occurred under controlling Fourth Circuit case law.

As Defendants have previously argued, "there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions . . . of Title VII. " Page v. Bolger, 645 F.2d 227, 233 (4th Cir.), cert. denied, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981). Plaintiff has unconvincingly attempted to distinguish the Fourth Circuit's en banc decision in Page by arguing that the present case, unlike Page, involves an ultimate employment decision affecting compensation. However, Plaintiffs argument is based on the false premise that Plaintiff was given a "Requires Improvement" rating that adversely affected his compensation. As discussed above, Plaintiff was given no such rating during the time period covered by his EEOC charge. Moreover, Plaintiff could not have received a raise or bonus in early 1993 because he was on disability leave, thus his compensation would have remained unchanged even if there had not been concerns about his performance.

The only case cited by Plaintiff in support of his argument that his year-end 1992 performance evaluation (which was written in early 1993 but not administered) constituted an adverse employment action for purposes of a prima facie case is a district

court decision from New Jersey, Khair v. Campbell Soup Company, 893 F. Supp. 316 (D.N.J. 1995). However, Khair is distinguishable from the present case, since the plaintiff in Khair had demonstrated that a lower performance rating affected his pay. In contrast, the Plaintiff in this case would not have received a raise or bonus when they were awarded to other employees in early 1993, regardless of his performance rating, because he was not actively employed at the time. Further, the statement in Khair that a lower performance rating could constitute an adverse employment action was mere dicta. The Khair court held that summary judgment in favor of the defendant was warranted on

the plaintiffs claim that he was given a lower performance rating in retaliation for protected activity, since there was no evidence from which to find a discriminatory motive. Id. at 336. The court's statement regarding whether the plaintiff had established a prima facie case by alleging a lower performance rating was therefore not necessary to the decision reached by the court.

Moreover, the Khair decision cited by Plaintiff does not appear to reflect the law in the Fourth Circuit. Plaintiff has made no attempt to address or distinguish the numerous decisions from

courts in this Circuit -- other than Page -- cited by Defendants for the proposition that summary judgment must be granted where a plaintiff cannot show that there has been any action taken against him which rises to the level of an adverse employment action. See e.g., Devine v. Thalhimers, 1992 U.S. App. LEXIS 27496 (4th Cir. 1992)(affirming summary judgment where plaintiff "failed to show that she suffered an adverse employment decision and therefore could not establish a prima facie case of employment discrimination"); Caussade v. Brown, 924 F. Supp. 693 (D. Md. 1996)(alleged actions which included disparaging statements and reassignment to a position without an office were insufficient to make a prima facie showing of an adverse employment action); Hopkins v. Baltimore Gas & Electric Co., 871 F. Supp. 822, 836 (D. Md. 1994), aff'd, 77 F.3d 745 (4th Cir. 1996)(allegedly abusive verbal comments and formal written warning that resulted in no further disciplinary action did not constitute adverse employment actions); Keegan v. Dalton, 899 F. Supp. 1503, 1511 (E.D. Va. 1995)(where plaintiff at best alleged that her supervisors erected minor hindrances to the timely accomplishment of her job, there was no showing of an adverse employment action); Ward v. Johns Hopkins University, 861 F. Supp. 367, 377 (D. Md. 1994)(allegations that supervisor ceased speaking with employee and gave her less favorable assignments do not amount to adverse employment actions as a matter of law);

Lucas v. Cheney, 821 F. Supp. 374, 375 (D. Md. 1992), aff'd, 991 F.2d 470 (4th Cir. 1993)(neither threat by superior nor letters of reprimand constituted adverse employment

decisions). See also Dollis v. Rubin, 77 F.3d 777, 781-782 (5th Cir. 1995)("Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have had some tangential effect upon those ultimate decisions.").

Under Fourth Circuit precedent applicable to this case, Plaintiff has failed to present evidence sufficient to show that he was subject to any adverse employment action. His claim must therefore be dismissed for failure to make out a prima facie case.

II. PLAINTIFF HAS NOT FORECAST EVIDENCE TO CARRY HIS ULTIMATE BURDEN OF PROVING DISCRIMINATORY TREATMENT.

Plaintiff has made no attempt to address Defendants' argument that Plaintiff would be unable to carry his ultimate burden of proving that Cape Industries intentionally discriminated against him on the basis of race, even if he were able to make out

the elements of a prima facie case. Plaintiff's failure to present facts sufficient to support a jury verdict in his favor provides an independent basis for summary judgment in favor of the Defendants. See generally Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 17-19.[13]

III. PLAINTIFF'S PURPORTED HARASSMENT CLAIM IS OUTSIDE THE SCOPE OF HIS EEOC CHARGE AND DOES NOT ALLEGE FACTS WHICH RISE TO THE LEVEL OF ACTIONABLE HARASSMENT.

Defendants have argued that Plaintiff cannot pursue a harassment claim in this litigation, since he did not raise any claim of harassment in his EEOC charge. See generally Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 19-21. Plaintiff has not directly addressed this argument. However, Plaintiff implies that he attempted to amend his

[13]In fact, Plaintiff's statement that he became depressed as early as August 1992 (Response Brief at 6) undercuts his unsupported assertion that all criticism of his performance was unwarranted and racially motivated. Rather, it is likely that Plaintiffs performance suffered due to the effects of his depression and that the criticism of Plaintiff reflected his performance problems.

EEOC charge, stating that "by letter dated December 22, 1993, Lynn Fontana, the Plaintiff's Attorney at that time requested to Amend the Charge to allege a claim for emotional distress. [14]

Plaintiff's argument that this letter from his attorney was sufficient to transform his disparate treatment charge before the EEOC into a racial harassment charge is flawed for at least three reasons. First, Ms. Fontana's letter did not, in fact, make any request to amend the pending EEOC charge. Instead, Ms. Fontana asked the EEOC simply to "let [her] know whether the charge needs to be amended.[15] Second, Ms. Fontana's letter never even suggested that the underlying claim should encompass allegations of harassment. Rather, she attempted to argue that the EEOC could consider awarding emotional distress damages to Plaintiff for his claim that he was given a disproportionately greater workload with less assistance than other engineers.[16] Third, Ms. Fontana's December 22, 1993 letter could not, as matter of law, have been effective to add a new charge of harassment, since it came more than a year after Plaintiff ceased work at Cape Industries -- well beyond the 180-day period within which discrimination charges must be filed with the EEOC.[17]

Plaintiff has made no attempt to address Defendants' argument that Plaintiff has failed to allege facts which could support a claim for racial harassment. See generally Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 21-22. Plaintiff has at most alleged that he was monitored and criticized by his supervisors, but such allegations, even if true, do not constitute severe or pervasive harassment based on the Plaintiff's race. Plaintiff's

[14] Response Brief at 18.

[15] See Fontana letter at p.2 (submitted by Plaintiff as Exhibit F; emphasis added).

[16]Id.at pp.1-2.

[17] See 42 U.S.C. sec. 2000e-5(e).

failure to allege facts which rise to the level of actionable harassment, as a matter of law, provides an independent basis for summary judgment in favor of the Defendants with regard to Plaintiffs harassment claims.

IV. PLAINTIFF FAILED TO FILE AN EEOC CHARGE WITHIN 180 DAYS OF BECOMING AWARE OF THE FACTS UPON WHICH HIS CLAIM IS BASED

Plaintiff has failed to identify any genuine issue of material fact in response to Defendants' argument that Plaintiff failed to file any charge with the EEOC until more than 180 days after he believed -- according to his own testimony -- that he had a basis for filing a charge. See generally Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 22-26.

Plaintiff has alluded to the doctrines of "equitable tolling" and "continuing violations" in an effort to salvage his untimely charge.[18] Yet, in making his argument to the Court, Plaintiff has not cited any facts demonstrating that those doctrines are applicable to the present case. Indeed, Plaintiff cannot point to any such facts, since he has testified in his deposition that he "knew that the race card was in it" by at least July 27, 1992, more than 180 days before he filed any charge with the EEOC.[19]

Plaintiff's discrimination claim should therefore be barred for failure to file an administrative charge within the statutory limitations period.

CONCLUSION

Based on the arguments presented above and in the memorandum of law in support of their Motion for Summary Judgment, summary judgment should be granted in favor of Defendants.

[18] Response Brief at 18-19.

[19] Ex. 23, Jackson Dep. at 68. See also Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 23-26, and deposition testimony cited therein.

This the 15th day of October, 1996.

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Durham, North Carolina 27705
Telephone: (919)286-8000

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 9, 1998

No. 97-1111 CA-95-175-7-F

WARREN I. JACKSON
Plaintiff - Appellant

v.

NCT CORPORATION AND PFS CORPORATION,
a joint venture,
d/b/a Hoechst Celanese Polyester Intermediates
Defendant - Appellee

and

HOECHST-CELANESE OF WILMINGTON,
formerly doing business as Cape Industries
Defendant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/S/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1111

WARREN I. JACKSON,

Plaintiff - Appellant,

versus

NCT CORPORATION AND PFS CORPORATION, a joint venture, d/b/a Hoechst Celanese Polyester Intermediates,

Defendant - Appellee,

and

HOECHST-CELANESE OF WILMINGTON, formerly doing business as Cape Industries,

Defendant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. James C. Fox, District Judge. (CA-95-175-7-F)

Submitted: April 16, 1998

Decided: April 28, 1998

Before WILKINS and HAMILTON, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Warren I. Jackson, Appellant Pro Se. George Verner Hanna, III, MOORE & VAN ALLEN, Charlotte, North Carolina; Andrew Bruce Cohen, MOORE & VAN ALLEN, Durham, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant appeals the district court's orders dismissing his employment discrimination action and denying his motion for reconsideration. We have reviewed the record and the district court's opinions and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Jackson v NCT Corp. & PFS Corp., No. CA-95-175-7-F (E.D.N.C. Oct. 30 & Dec. 17, 1996). We also deny Appellee's motion to dismiss and motion to strike documents. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
NO. _____

FILED
DEC 1 1995
DAVID W. DANIEL, CLERK
U S DISTRICT COURT
E. DIST. NC. CAR.

Warren I. Jackson)
)
vs.) COMPLAINT
Cape Industries
(Now known as Hoechst-Celanese of Wilmington)

1. Plaintiff resides at 4101 Appleton Way, Wilmington North Carolina 28412

2. Defendant(s)' name(s) Cape Industries

Location of principle office(s) of the named defendant(s)
P.0. Box 327, Highway 421 North, Wilmington, North Carolina 28402

Nature of defendant(s)' business: Chemical Manufacturer

Approximate number of individuals employed by defendant: 300

3. This action is brought pursuant to Title VII of the Civil Rights Act of 1964 for employment discrimination. Jurisdiction is specifically conferred on the Court by 42 U.S.C. § 2000e-5. Equitable and other relief are also sought under 42 U.S.C. § 20003-5(g).

4. The acts complained of in this suit concern:

(A) _____ Failure to employ me.

(B) _____ Termination of my employment.

(C) _____ Failure to promote me..

(D) X Other acts as specified below:

Different terms and conditions, and harassment after questioning what I believe to be discriminatory practices.

5. Plaintiff is:

(A) X presently employed by defendant. (On long-term disability)

(B) _____ not presently employed by the defendant.

The dates of his employment were _____ Employment was terminated
because:

(1) _____ plaintiff was discharged.

(2) _____ plaintiff was laid off.

(3) _____ plaintiff left the job voluntarily.

6. Defendant(s)' conduct is discriminatory with respect to the following:

(A) X____ my race

(B) _____ my religion

(C) _____ my sex.

(D) _____ my national origin.

(E) _____ other as specified as below:

7. The name(s), race, sex, and the position or title of the individual(s) who allegedly discriminated against me during the period of my employment with the defendant company is (are)

Miguel Chen - Section Leader, Process Engineering Group
William King - Production Manager
Ken Stach - Technical Manager
Roy Neal - Section Leader, Human Resources
Ron Rasile - Human Resource Manager

8. The alleged discrimination occurred on or about April 1, 1992 through October 27, 1992

9. The nature of my complaint, i.e. the manner in which the individual(s) named above discriminated against me in terms of the conditions of my employment is as follows: Because of my race, Black, I was assigned an unreasonable workload versus similarly situated white Senior Process Engineers. Similarly situated Senior Process Engineers were assigned additional Process Engineers who assisted them with their work. My requests for additional support personnel were denied. After pointing out what I believed to be discriminatory practices, I received a written reprimand (mid-year review), stating that I was to be less confrontational, and I was to do all my work with no (continued on Attachment 1)

10. The alleged activity took place at: Cape Industries, Highway 421: North, Wilmington, North Carolina

11. I filed charges with the Equal Employment Opportunity Commission regarding defendant's alleged discriminatory conduct on

or about February 2, 1993. I have attached a copy of the Notice-of-Right-to-Sue letter issued by the Equal Employment Opportunity Commission. This letter was received by me on September 2, 1995.

12. I seek the following relief:

(A) X recovery of back pay;

(B) reinstatement to my former job;

(C) X trial by jury on all issues so triable; and any other relief as may be appropriate, including injunctive orders, damages, costs and attorney fees.

October 26, 1995
Date

/s/ Warren I. Jackson
Signature of Plaintiff

Warren I. Jackson
4101 Appleton Way
Wilmington, North Carolina 28412
(910) 452-5306
Address and Phone Number of Plaintiff

Attachment 1

9. assistance, and then I was constantly harassed by supervision. This harassment and discriminatory

terms and conditions caused me to go into depression. Consequently, I have been on disability since October 27, 1992.

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY	CHARGE NUMBER
FEPA	1752
EEOC	l4A93 0049

New Hanover Human Relations Commission and EEOC

State or local Agency, if any

NAME (indicate Mr.. Ms.. Mrs.)
Warren l. Jackson

HOME TELEPHONE (Include Area Code)
919/452-5306

STREET ADDRESS	CITY, STATE AND ZIP CODE
4101 Appleton Way	Wilmington, NC 28412

DATE OF BIRTH
01/12/58

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE,

STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME
Cape Industries

NUMBER OF EMPLOYEES, MEMBERS
15 or more

TELEPHONE (Include Area Code)
919/341-5500

STREET ADDRESS	CITY, STATE AND ZIP CODE
POB 327, HWY 421	Wilmington, NC 28402

COUNTY
129

NAME	TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS	CITY& STATE AND ZIP CODE

COUNTY

CAUSE OF DISCRIMINATION BASED ON
(Check appropriate box(es))

x RACE __COLOR __SEX
__RELIGION __NATIONAL ORIGIN
__RETALIATION __AGE __DISABILITY
__OTHER(Specify)

DATE DISCRIMINATION TOOK PLACE
Earliest Latest
10/27/92
__CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I. From around November 1991 to October 27, 1992 I was subjected to different terms and conditions of employment on the basis of my race, black. I have been employed by the Respondent since October 1991 as a Senior Process Engineer. The Respondent employs fifteen (15) or more persons.

II. From around November 1991 to October 27, 1992 my immediate supervisors denied me access to support personnel that was provided similarly situated white senior process engineers. Also, I believe my immediate supervisors have treated me differently on the basis of my race by violating the employee Corrective Action Policy. I believe the Respondent has an equal employment opportunity policy.

III. I believe the Respondent has discriminated against me on the basis of my race/black.

_x_ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my
address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY (When necessary for State and Local Requirements)
/s/ Theatrice McClammy
I swear or affirm that I have read the charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 2/1/93
/s/Warren I. Jackson
Charging Party

SIGNATURE OF COMPLAINANT
/s/ Warren I. Jackson
SUBSCRIBED AND TO BEFORE ME THIS DATE

(Day, month, and year)
01,02,93
MY COMMISSION EXPIRES 10-14-93

EEOC FORM 5 (Rev. 06/92)

STATE OF: North Carolina NHHRC
NUMBER: FEPA

CITY/COUNTY OF: Wilmington/New Hanover
CHARGING PARTY: Jackson

AFFIDAVIT

I, Warren I. Jackson, being first duly sworn upon my oath affirm and hereby say:

I am 35 years of age, my gender is male and my racial identity is black.

I reside at 4101 Appleton Way, City of Wilmington, County of New Hanover, State of North Carolina, Zip Code 28412. My telephone number is (919) 452-5306.

My complaint is against Cape Industries, located HWY 421 North POB 327, Wilmington, NC 28402. Their telephone number is (919) 341-5500.

My job classification is: Senior Process Engineer.

My immediate supervisor is: Miguel Chen

I was hired by Cape Industries October 7, 1991 as a Level 10 Senior Process Engineer. I have been on short-term disability leave since October 27, 1992.

My immediate supervisor is Process Engineering Group Section Leader Miguel Chen. Billy King (white), Technical Manager, was Mr. Chen's supervisor until around August 1992 when he was replaced by Ken Stach (white).

From around November 1991 to October 27, 1992 I was subjected to different terms and conditions of employment on the basis of my race, black. These different conditions were in the areas of workload, expectations and policy administration.

I was responsible for a 7.2 million portion of the 1992 capital budget. Three white senior process engineers (Charles Kernan, William Rush and Alan Brackey) were responsible for only 2.8 million of the 1992 capital budget. On two to three occasions I requested support personnel be allotted to assist me.

These requests were denied by Mr. Chen, Mr. King and Mr. Stach. On one occasion Mr. King reversed Mr. Chen's decision and a Level 1 Engineer was assigned to assist me for two weeks. Support personnel, two Level 1 Engineers and a co-op student, were provided the three white senior process engineers.

On July 27, 1992 Mr. Chen wrote on my mid-year performance review that I was "not to leverage your work, i.e., have others do it." A

NHHRC NUMBER: FEPA

AFFIDAVIT

---

review of the "Descriptor" for a Senior Process Engineer (reference HCC Chemical Group Technical Hierarchy Manual), clearly states a Level 10 characteristic is the following: "utilizes appropriate resources for solving challenging problems." I do not believe the three white senior process engineers have been criticized for utilizing support personnel when appropriate.

The employee corrective action practice is a five step (A through E) progressive procedure. I believe I have been treated unfairly because Mr. Chen has violated

the policy during 1992 when evaluating me. I am not aware of how the Corrective Action Policy has been applied to white senior process engineers.

My 1992 mid-year performance review concluded I required improvement. I believe my 1992 year-end [review] also states improvement is required. Based on the two 1992 performance evaluations I will not receive my employee profit sharing check (approximately $900) and I also will not receive a pay increase of approximately 5%.

Included on the 1992 mid-year performance review is an allegation that I am "confrontational." I believe this allegation is based on racial stereotyping.

I am requesting affirmative relief, elimination of different terms and conditions of employment, retroactive pay increase and profit sharing payment.

I swear (or affirm) that the information and matters set forth in this writing are true to the best of my knowledge, information and belief.

/s/ Warren I. Jackson 2/1/93
Warren I. Jackson Date

Subscribed and sworn to before me
this 2 day of February 1993.

/s/ Theatrice McClammy

Notary Public

Performance Review Process Hoechst Celanese

Performance Review Summary
Page 1 of 2

EMPLOYEE	SOCIAL SECURITY NO.
Warren I. Jackson	237-11-8552

POSITION
Senior Process Engineer

TIME IN POSITION	YEARS	MONTHS
	0	3

GROUP/DIV/UNIT	LOCATION
Film & Fibers Group	Cape Industries

DEPARTMENT
Process Engineering - Technical

SUPERVISOR	REVIEW PERIOD	
	FROM	TO
Miguel Chen	1-91	1-92

I. Performance Summary
List the key achievements against objectives and/or expectations based on the Values (performance, people, process) and describe how each objective was carried out. Address specific results and the manner in which results were achieved.

* Warren joined the company in October 1991 and was assigned the formic and acetic acids recovery from waste water process development. He has demonstrated good technical skills in developing a preliminary PFD and sizing equipments. Warren has shown a good appreciation for teamwork effort by seeking input/involvement from all the project team members.

*Warren is very safety conscious as shown in his involvement in the acid recovery project, A/B line oxidation PSR team, and A/B line cymene replacement team. He has challenged team members to increase their safety awareness in developing and executing these projects.

*In the short time Warren has been here he has demonstrated his technical know-how in unit operations and commitment to working in a team environment.

*Warren is committed to community involvement by volunteering to join CI ROCAME support group. He has talked to high school students regarding engineering careers.

Performance Review Process Performance Review
Summary Page 2 of 2

II. Overall Performance Evaluation

[x] Quality - This is the performance expected of Hoechst Celanese employees. The standard is met when performance consistently conforms to the expected requirements even though there may be variations above and below standard.

[ ] Exceptional - Results and/or the manner in which they are obtained frequently exceed requirements and would fall in a category clearly above most peers.

[ ] Requires Improvement - Results and/or the manner in which they are obtained frequently do not conform to requirements. Performance must improve within a reasonable time.

III. Continual Improvement Plan
Describe activities planned to enhance performance.

* Attend training class in Proll process simulation.
* Continue involvement in A/B line cymene replacement project and PSR teams.
* Attend a safety training seminar.

IV. Employee Comments

"I am enjoying my initial assignment as I work toward gaining total acceptance from the organization here. I am anticipating with time, opportunities to broaden my impact and influence. WIJ"

I have had the opportunity to review and discuss this performance appraisal with my supervisor and I (check one)
[ ] do [x] do not
request further review with my second level supervisor.

I (check one) [ ] did[x] did not receive a mid-year review.

V. Signatures

EMPLOYEE DATE

/s/ Warren I. Jackson	1/30/92
SUPERVISOR	DATE
/s/ Miguel Chen	1/30/92
SECOND LEVEL SUPERVISOR	DATE
/s/ W M King	1/31/92
HUMAN RESOURCES	DATE
/s/ Roy Neal	2/3/92

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7-95-CV-175-F(3)

WARREN I. JACKSON, Plaintiff,	)	
vs.	)	AFFIDAVIT
	)	OF
NCT CORPORATION and PFS CORPORATION, joint venture DBA "HOECHST CELANESE POLYESTER INTERMEDIATES", Defendants	)	WARREN I. JACKSON

I, WARREN I. JACKSON, deposes and says:

1. I am the Plaintiff in the above-referenced action. I know personally of the matters set forth herein and, if called to testify, I will truthfully testify thereto.

2. I was hired as a Senior Process Engineer by Defendant Corporation in October, 1991

at an annual salary of FIFTY SEVEN THOUSAND FIVE HUNDRED DOLLARS ($57,500.OO). When I began my employment, I was assigned the Low Acid Recovery Project.

3. Defendant needed a process to economically remove and recover low concentrations of Acetic and Formic Acid from plant wastewater, prior to discharging this wastewater into the Cape Fear River. No technology was available at such time. Therefore, it was necessary to develop this project. Defendant allotted approximately $7.2 MILLION DOLLARS for the construction of this recovery plant. The Low Acid Recovery Process became operational in 1996.

4. In January, 1992, I received my first year-end evaluation. According to that review, I received a Quality rating. An employee in my position was eligible to receive the following performance rating:

1. Quality - This is the performance expected of Hoechst Celanese employees. The standard is met when performance consistently conforms to the expected requirements even though there may be variations above and below standard;
2. Exceptional - Results and/or the manner in which they are obtained frequently exceed requirements and would

fall in a category clearly above most peers; and

3. Requires Improvement - Results and/or the manner in which they are obtained frequently do not conform to requirements. Performance must improve within a reasonable time.

(A copy of Warren Jackson's 1991 Performance Review Summary is attached hereto and incorporated herein by reference.)

5. On April 27, 1992, Crystal Turner, a black female interviewed for an engineering position with Defendant Corporation. I actively championed the hiring of this candidate. At one point, my immediate Supervisor, Miguel Chen, stated, "You should not have spoken up for hiring Crystal Turner because other engineers were reluctant to say what they really felt about hiring her. They did not want to be perceived as being against cultural diversity." Thereafter, my relationship with my supervisors began to deteriorate.

6. Dick Hayes was the Manager for the Resins Group where was I assigned to work. Shortly after my advocation for hiring of the black female engineer, Hayes made several comments to me, which I felt were offensive. On May 19, 1992, Hayes remarked that:

1. You are still on your honeymoon;

2. You must demonstrate technical ability;
3. Do you have a Chemical Engineering degree;
4. You must pay your dues;
5. You are not part of the Team yet; and
6. You must play ball my way.

I felt that these remarks were derogatory; and that Hayes' comments alluded to racial stereotypes.

7. In the latter part of May, 1992, I complained to Billy King, Technical manager, about Hayes' stereotypical comments. I requested that the Corporation implement a cultural diversity training program. King responded in a menacing, threatening manner, "Are you saying that we're discriminating against you?"

8. In June, 1992, I received an exercise from my supervisor, Miguel Chen, in order to test my technical abilities. Chen acted in a hostile manner towards me at that time.

9. Thereafter, on or about July 27, 1992, I received a mid-year review. Defendant considered me confrontational; and had performance issues because of my discussions on cultural diversity issues. I was instructed at that time that I had to do all of the assigned work on [m]y own; and that I was not to get assistance. After the mid-year review, my working conditions became increasingly worse. The number of reprimands which I had with supervisory

personnel began to increase. In other words, my supervisors began to monitor my every move and to keep a record of my behavior.

10. On or about August 5, 1992, I complained to supervisors that I was being treated differently; and that I thought I was being treated differently because of my race. On that same day, I talked with supervisors Ken Stach, Technical Manager, and King. As of August 5, 1992, the parties did not reach an agreement and agreed to meet again on August 6, 1992. On August 6, 1992, Chen, Stach, and King met with me. They informed me that they were not satisfied with my performance. However, I never saw an observation sheet and was never given an opportunity to sign a form acknowledging that I was advised to improve my work performance. I was not advised of the employee Assistance Program and no improvement plan was developed.[1] In the days and weeks which followed, I became depressed.

---

[1]Defendant Corporation has a Corrective Action Policy. The Corrective Action Policy outlines a three-step process which Defendant must follow when it determines that an employee needs to improve his job performance. Defendant did not follow that policy when dealing with Plaintiff. (A true and correct copy of the Corrective Action Policy is attached hereto as Exhibit "C" and is incorporated herein by referenced.)

11. On or about October 26, 1992, I, independently, went to see the EAP officer, Susan Roscher. Roscher referred me to Dr. Daniel Patterson. Dr. Patterson was the first therapist to examine me. Dr. Patterson recommended that I not return to work.

12. On or about October 27, 1992, I used my short-term is ability and left my job because of my depression.

13. Sometime in January, 1993 and while I was on short term disability, Defendant Corporation prepared the year-end performance review. My supervisors rated me "Required Improvement", consistent with their October 2, 1992 comments. During that same period, Defendant cancelled my American Express Card and Phone Card.

14. On January 21, 1993, I received a letter from Defendant requesting information from my doctor and informing me that failure to submit requested documents would result in cessation of my pay, although I had already satisfied the sick leave requirements. I complied with this request.

15. On February 2, 1993, I filed my charge with the Equal Employment Opportunity Commission. On that same day, I filed an Affidavit in support of the charge with the EEOC.

16. In May, 1993, I hired Attorney Lynn Fontana of Fontana Fine, P.A. to assist with the charge pending before the EEOC.

17. On April 26, 1993, I was cleared to return to work by Dr. Patterson. I was the only employee whom Dr. Patterson had cleared to return to work who was not permitted to work.

18. On April 15, 1993, Dr. Patterson also indicated that my depression was caused by my job.

19. On April 27, 1993, I was terminated. Thereafter, I applied for and was denied long term disability. I was eventually approved for long term disability on December 6, 1993.

20. On December 22, 1993, Fontana requested to amend my charge which was currently pending with the EEOC. However, the investigator closed the case without responding to the request.

21. Fontana terminated her legal representation around September, 1994.

22. I filed this action on December 1, 1995. Thereafter, I filed an Amended Complaint on December 12, 1995.

I declare under penalty of perjury under the laws of North Carolina that the foregoing is true and correct, and that this declaration was executed on October 2, 1996.

BY:/s/ Warren I. Jackson
WARREN I. JACKSON

NORTH CAROLINA,
COUNTY OF New Hanover

I, Janis M. Howard, a Notary Public of the County and state aforesaid, certify that WARREN I. JACKSON personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness and official stamp or seal, this 2nd day of October, 1996

/s/ Janis M. Howard
Notary Public
My Commission Expires: 6/25/2000

SEAL *Janis M. Howard*
Notary Public
New Hanover County, NC

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Southern Division
Civil Action No. 7:95-CV-175 F(3)

WARREN I. JACKSON	)	
	)	
Plaintiff	)	
v.	)	AFFIDAVIT
	)	
NCT CORPORATION	)	
and PFS CORPORATION,	)	
a joint venture DBA	)	
"HOECHST CELANESE	)	
POLYESTER	)	
INTERMEDIATES",	)	

Defendants.

Dr. Daniel Patterson, MD
1907 London Lane
Wilmington, NC 28405

I, Dr. DANIEL PATTERSON, am a medical doctor and I practiced psychiatry in Wilmington, NC for five years. I recently closed my private practice to accept the position of Medical Director for Wilmington Health Associates at 1202 Medical

Center Drive, Wilmington, NC. I know personally of the matters set forth herein, and if called to testify, I will truthfully testify thereto.

During my private practice, Warren I. Jackson came to me on October 27, 1992 for psychiatric evaluation through a referral from Susan Roscher, the Employee Assistance Program counselor for then called Cape Industries. After evaluating Mr. Jackson I found him to be severely depressed and insisted that he go on sick leave. I recall that Mr. Jackson's condition was clearly related to the environment that he was in at Cape Industries.

As I recall today, it was my impression soon after I began Mr. Jackson's treatment on October 27, 1992 that the company desired Mr. Jackson to be terminated versus him returning to work following my treatment of him. This impression was formed through conversation with
Cape Industries personnel. I did release Mr. Jackson to return to work as of April 26, 1993, although I felt that exposure to particular elements in his work environment would cause him to relapse.

As I recall today, I treated several other Cape Industries employees during the five years of my practice. However, Mr. Jackson was the only black Cape Industries employee that I can recall treating. All other Cape Industries employees that I released to return to work following treatment were reinstated.

I can authenticate the attached documents (Aetna Attending Physician's Statement completed by me on April 15, 1993 and the June 18, 1993 letter to Steven McSweeney of Aetna from myself), are true and accurate reproductions, and that they carry my signature.

I declare under the penalty of perjury that the foregoing statements are true.
Executed this the 27 day of September, 1996.

/s/ Daniel Y. Patterson
Dr. Daniel Y. Patterson, MD

STATE OF NORTH CAROLINA
New Hanover County
Sworn to and Subscribed to Before me
on this the 27th day of September, 1996
/s/ Jill K. Howell
Notary
My commission expires
My commission expires12/27/2000

SEAL *Jill K. Howell*
Notary Public
New Hanover County, NC

EXCERPTS FROM WARREN I JACKSON
DEPOSITION PAGES 76,77,78
RECORDED BY ANDERSON REPORTING
COMPANY, INC.

76

the Resins group. And my comments to Mr. Chen was that, you know, he said I had difficulty working with the Resins group and that that's -- you're putting that in as a negative. And I understood that I was removed for the business reason that we could find someone else to support him that Dick would feel more comfortable with -- Dick Hayes, that is -- and to free me up to put time on the higher priority projects. Now he's writing that as a negative that I had to be removed. And as we discussed it, then we came back into culture diversity issues or race issues. So the fact that this was put on my review that I had discussions with management about race relations in an effort to improve them I felt was

racially discriminatory, and I told them all that.
Q. Now, earlier today you talked about the fact that you were given more work than other senior process engineers.
A. I never said that today.
Q. Okay. Maybe that was something I saw in
- -
A. And I'm not finished talking about -- You asked me what happened in that July 27th review - -
Q. Okay. Go ahead.

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(202)289-2260 (800) FOR DEPO
1111 14th ST., N.W., 4th FLOOR WASHINGTON. D.C., 20005

A. -- and I'm not finished there. Mr. Chen wrote that I was to do all of my work on my own.
He put it in writing. Well, I looked, and I saw that April Mont Bleu was assisting Allen Brackey,
Matthew Young was assisting Buster Rush, Crystal

Turner was assisting Charles Kernon. That's what I observed. I looked in the technical hierarchy manual which gives the description -- or the job description for my level as a level ten engineer, and nowhere there does it say about doing all of your work on your own. It just wasn't -- it just wasn't there. In fact, in the job description, it talks about you expending your influence. It talks about you utilizing appropriate resources in the organization to accomplish tasks with little supervision. It talks about little questioning about how you get the job done, in fact, just that you get it done.

So my observations of how the white senior process engineers were being treated and the technical hierarchy manual which described the job position that I had said to me that I was being treated differently on the basis of my race. So that was discriminatory that I had to do all of my

25 work on my own. We talked about that. Well, if

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WASHINGTON, D.C., 20005

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1 you want me to work that way -- which was my
2 position -- then I can do it, but we're going to
3 have to push the time that this is due back and the
4 time that's due back, and you can't have it when
5 you want it because I can't accomplish it under
6 these restrictions that you've imposed on me and me
7 alone that you haven't imposed on the other white
8 senior process engineers. No, the response was
9 from the management, no, you have to do it all by
10 yourself, and you have to still keep the same
11 timing.

Well, that's program failure. That's catch-22. How can I win that one. If I got the job done, then I had to utilize resources, but I was told to do all of my work by myself.

Q. And this was at the July 27th, 1992, review?

A. This is July 27th. If I tried to do the work all by myself, then there was no way that I could have met the timing, so I have a performance issue in that area. It was set up so that whichever way I went, I would have a performance issue down the road.

The less confrontational comment in that review was, again, tagged back in this meeting and

EXCERPTS FROM MIGUEL CHEN DEPOSITION - PAGES 25,27
RECORDED BY AURELIA RUFFIN AND ASSOCIATES

marked as plaintiff's Exhibit Number 6. Will you identify that for us, please?

A That is a Performance Review for William Rush from January of 1992 to January of 1993.

Q And can you tell us who is the supervisor for that individual?

A The supervisor is Miguel Chen; myself.

Q And who assisted you in preparing that Performance Review?

A All the Performance Reviews that I have done were done in conjunction with the employees.

Q For instance, in this case, it would be...

A William Rush.

Q Okay. Can you look in that review and tell us who directed co-op student Neal Gresham?

A Buster Rush was working with Neal Gresham at this time.

Q Can you read to us what it says there about Buster

and Neal Gresham, please, for the record?
A "Buster did an excellent job as 'buddy' for recent college graduate Matt Young and in directing co-op student Neal Gresham."

---

providing technical support to the Resin Plant."
Q Who directed Ron Eubanks again?
A Al Brackey.
Q Okay. Under Diversity, do you see any reference to Al Brackey supporting or assisting in the recruiting of Crystal Turner?
A No.
Q Let me show you what has previously been marked as plaintiff's Exhibit Number 7. Can you identify that document for us, please?
A It is a Performance Review for Charles Kernan dated January of 1992 to January of 1993; Supervisor, Miguel Chen.
Q And who assisted you in preparing that performance

EXCERPTS FROM KEN STACH DEPOSITION
PAGES 101,102,125,126.
RECORDED BY FREELANCE REPORTING
SERVICES (864) 587-7050

DEPOSITION OF KENNETH W. STACK 101

--FOR THE EMPLOYEE?
MR. COHEN:
ARE YOU ASKING IF THEY'RE THE SAME OR IF ONE IS A SUBSET OF THE OTHER?
EXAMINATION RESUMED BY MR. JACKSON:
A. I'M NOT SURE I UNDERSTAND THE QUESTION. I MEAN, THIS IS A WRITTEN POLICY. IT SAYS IN HERE -- INCLUDED IN THE FINAL CORRECTIVE ACTION PLAN IS A STATEMENT ADVISING THE EMPLOYEE OF AVAILABILITY OF E.A.P,. SERVICES. THERE ARE -- I MEAN, THERE ARE FIVE PAGES OF INFORMATION HERE REGARDING THE CORRECTIVE ACTION. THERE'S A LOT OF INFORMATION IN HERE.
Q. WAS IT YOUR UNDERSTANDING THAT THE PLAINTIFF'S MID-YEAR

PERFORMANCE WAS REQUIRED IMPROVEMENT?
A. MID-YEAR --
Q. 1992.
A.-- 1992, NO.
Q. THAT WASN'T YOUR UNDERSTANDING?
A. THAT -- THAT WAS NOT MY UNDERSTANDING.
Q. SO IF ROY NEAL PUT FORTH STATEMENTS TO THE E.E.O.C. DURING THE INVESTIGATION THAT THAT WAS THE CASE THEN, HE WOULD BE MISTAKEN?
A. I DON'T KNOW. I'M JUST TELLING YOU WHAT MY UNDERSTANDING WAS.
Q. DID YOU CONSIDER ON OCTOBER 2, 1992, PLAINTIFF'S

PERFORMANCE TO BE REQUIRED IMPROVEMENT?
A. YES. ON OCTOBER 2ND, I THINK SO.
Q. DID YOU PROVIDE ANY ORAL CONFIRMATION SLIPS THAT WERE

SIGNED BY THE PLAINTIFF IN RELATIONSHIP TO THESE SUPERVISOR CONTACTS?
A. NOT TO MY RECOLLECTION.
DEPOSITION OF KENNETH W. STACK 102

Q. DID YOU PROVIDE ANY WRITTEN CONFIRMATION SLIPS SIGNED BY THE EMPLOYEE IN RELATIONSHIP TO THESE CONTACTS?
A. NOT TO MY RECOLLECTION.
Q. DID YOU NOTIFY, INFORM THE EMPLOYEE -- THE PLAINTIFF OF THE AVAILABILITY OF AN E.A.P. COUNSELOR IN ANY OF THESE CONTACTS?
A. I DID NOT PERSONALLY. I DON'T RECALL IF ANYONE--
Q. DID YOU OUTLINE AN IMPROVEMENT PLAN FOR THE PLAINTIFF TO IMPROVE HIS PERFORMANCE AT ANYTIME?
A. YES. THAT WAS -- THAT WAS THE OBJECTIVE OF THE OCTOBER 2ND MEETING AND SOME OF THE OTHER MEETINGS THAT WE 'VE BEEN DISCUSSING TODAY.
Q. DID THAT PLAN PARALLEL PLANS THAT YOU 'VE DEVELOPED

SIMILARLY FOR WHITE SITUATED SENIOR PROCESS ENGINEERS?
A. THE REASON I'M PAUSING, I'M TRYING TO THINK. I--
Q. FOR EXAMPLE--
A. I'VE NEVER -- I'VE NEVER HAD ANOTHER SENIOR PROCESS ENGINEER ON A REQUIRES IMPROVEMENT PLAN.
Q. FOR EXAMPLE -- AND THIS IS REFERRING TO EXHIBIT #7 FOR

BY BEING CATHOLIC.
Q. DID MIGUEL CHEN EVER EXPRESS TO YOU ANY DESIRES THAT HE WANTED TO FIRE ME -- FIRE THE PLAINTIFF IN THIS CASE?
A. NO.
Q. DO YOU KNOW OF MR. CHEN EXPRESSING HIS DESIRE TO WANT TO GET RID OF THE PLAINTIFF IN THIS CASE TO ANYONE ELSE?
A. NO.

Q. CAN YOU TELL US WHY THE PLAINTIFF IN THIS CASE DID NOT RECEIVE A PERFORMANCE OR PROFIT SHARING BONUS IN 1993?

A. BECAUSE THE JANUARY/FEBRUARY -- THE -- THE PERFORMANCE REVIEW WE'VE BEEN REFERRING TO OF CIRCA JANUARY 1993 THAT IS IN PLAINTIFF'S -- PLAINTIFF'S EXHIBIT #8-- HOLD IT. I TAKE THAT BACK. I CAN'T FIND IT IN EXHIBIT #8.

Q. I THINK WE KNOW WHICH ONE YOU'RE TALKING ABOUT.

A. IT'S IN PLAINTIFF'S EXHIBIT #5, THIRD PAGE IN. THAT PERFORMANCE REVIEW WHEN ADMINISTERED -- IF IT HAD BEEN ADMINISTERED -- THE EMPLOYEE WAS OUT ON LEAVE -- WOULD HAVE RESULTED IN A REQUIRES IMPROVEMENT. ONE OF THE STIPULATIONS THEREOF OF A REQUIRES IMPROVEMENT IS NO PROFIT SHARING FOR THE PREVIOUS YEAR.

Q. CAN YOU TELL US WHY THE PLAINTIFF IN THIS CASE DID NOT

RECEIVE A COST OF LIVING INCREASE OR MERIT RAISE -- ANY RAISE OF ANY TYPE IN 1993?

A. THE SAME REASON AS I STATED FOR THE ANSWER TO THE PREVIOUS QUESTION.
Q. AND THAT IS?
A. AND THAT IS THAT THIS WOULD HAVE BEEN A REQUIRES IMPROVEMENT APPRAISAL, AS WRITTEN, AND, AGAIN, ONE OF THE STIPULATIONS OF REQUIRES IMPROVEMENT IS NO INCREASE IN SALARY.
Q. IN 1992, THE -- CAN YOU TELL US WHY THE PLAINTIFF'S PERFORMANCE OR PROFIT SHARING BONUS WAS CUT IN HALF?
A. IN 1992?
Q. YES.
A. BECAUSE THAT INDIVIDUAL HIRED ON IN OCTOBER 7 OF '91. THE INDIVIDUAL SHOULD HAVE RECEIVED THREE/TWELFTHS OF A YEAR'S BONUS BECAUSE OF THEM BEING -- THE 1992 BONUS IS BASED ON THE 1991 CALENDAR YEAR. SO AT THE END OF 1991, THAT INDIVIDUAL WOULD HAVE HAD OCTOBER, NOVEMBER AND DECEMBER OF '91. 50 IF HE OR SHE RECEIVED -- IN

THIS CASE, IF HE RECEIVED HALF THEIR SHARE IN BONUS, IT SHOULD HAVE BEEN -- THAT WAS DOUBLE WHAT HE WOULD HAVE RECEIVED HAD I BEEN DEPARTMENT MANAGER. HE WOULD HAVE RECEIVED THREE/TWELFTHS INSTEAD OF SIX/TWELFTHS.

Q. WAS THIS REQUIRED IMPROVEMENT BASED ON THE PLAINTIFF SELLING HERBALIFE ON THE JOB IN PART?

A. NO. THAT -- THE -- IF YOU READ THROUGH THE DOCUMENT IN PLAINTIFF'S -- PLAINTIFF'S EXHIBIT NUMBER 5-- THAT'S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE
(Issued on request)

To:

Mr. Warren I. Jackson
4101 Appleton Way
Wilmington, N.C. 28412

[ ]On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))

From:

Equal Employment Opportunity
5500 Central Avenue
Charlotte, N.C. 28212

Charge Number
14A930049

EEOC Representative	Telephone Number
Brenda L. Lightsey, Enforcement Supervisor	(704) 567-7133

(See the additional information attached to this form.)

TO THE PERSON AGGRIEVED: This is your NOTICE OF RIGHT TO SUE. It is issued at your

request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

[x] More than 180 days have expired since the filing of this charge.

[ ] Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will unable to complete its process within 180 days from the filing of the charge.

[x] With the issuance of this NOTICE OF RIGHT TO SUE, the Commission is terminating its process with respect to this charge.

[ ] It has been determined that the Commission will continue to investigate your charge.

[ ] ADEA: While Title VII and the ADA require EEOC to issue this notice of right to sue before you can bring a lawsuit you may sue under the Age Discrimination in Employment Act (ADEA) any time 60 days after your charge was filed until 90 days after you received notice that EEOC has completed action on your charge.

[ ] Because EEOC is closing your case, your lawsuit under the ADEA must be brought within 90

days of your receipt of this notice. Otherwise, your right to sue is lost.

[ ] EEOC is continuing its investigation. You will be notified when we have completed action and, if our notice will include notice of right to sue under the ADEA.

[ ] EPA: While Title VII and the ADA require EEOC to issue this Notice of Right to Sue before you can bring a lawsuit you already have the right to sue under the Equal Pay Act (EPA) (You are not required to complain to any enforcement agency before bringing an EPA suit in court). EPA suits must be brought within 2 years (3 years for willful violations) of the alleged EPA underpayment.

I certify that this notice was mailed on the date set out below.

August 31, 1995
(Date Mailed)

On Behalf of the Commission
/s/ Michael H. Whitlow for
Marsha J. Drain,DistrictDirector

Enclosures
Information Sheet
Copy of Charge

cc: Respondents Cape Industries (Now Hoechst Celanese Corporation)

EEOC Form 161-B (Test 10/94)

Cape Industries
Highway 421 North • P.O. Box 327
Wilmington, North Carolina 28402-0327
Telephone: (919) 341-5500

March 4, 1993

Ms. Patricia Monroe
Equal Employment Opportunity Commission
5500 Central Avenue
Charlotte, North Carolina 28212

Re: Warren I. Jackson vs- Cape Industries

We are in receipt of the above referenced charge and are submitting information which we believe will lead to a finding of no probable cause to the charge of discrimination. Cape Industries is committed to equal employment opportunity and endeavors to create and maintain a work force free of discrimination. We have an active Equality Committee, composed of a cross section of employees which serves as a vehicle to encourage equality and diversity in the workplace. The Equality Committee has sponsored equality/diversity workshops with the intent of having all employees attend a half day workshop.

We are submitting this position statement as it should prove useful for you to understand the circumstances surrounding Mr. Jackson's charge from our perspective.

Allegation I. From around November 1991 to October 27, 1992 I was subjected to different terms and conditions of employment on the basis of my race, black. I have been employed by the respondent since October 1991 as a Senior Process Engineer. The Respondent employs fifteen (15) or more persons.

Response: The terms and conditions of Mr. Jackson's employment were no different than that of any other Senior Process Engineer. (refer to response II)

Allegation II. From around November 1991 to October 27, 1992 my immediate supervisors denied me access to support personnel that was provided similarly situated white senior process engineers. Also, I believe my immediate supervisors have treated me differently on the basis of my race by violating the employee Corrective Action Policy. I believe the Respondent has an equal employment opportunity policy.

Response: Senior Process Engineers were not assigned support personnel. All the engineers reported to the Section Leader, who assigned them to projects based on the size and scope of the project. If

multiple engineers were assigned to a project they had specific tasks to perform, with no reporting relationship to each other. No corrective action has been taken with Mr. Jackson. His mid-year performance review covered problem areas and gave recommendations for improvement. No adverse action was taken against Mr. Jackson.

Allegation III. I believe the Respondent has discriminated against me on the basis of my race/black.

Response: In a follow up meeting to Mr. Jackson's performance review, on August 6, 1992, Mr. Jackson stated there was a need for cultural diversity training at Cape Industries, which prompted Bill King, the Operations Manager to ask Mr. Jackson if he felt he had been discriminated against in any way. Mr. Jackson responded that there had been no discrimination toward him at Cape Industries. The Equality Committee was already planning the Equality/Diversity workshops, which were conducted in the fourth quarter 1992.

Mr. Jackson has been on a paid medical leave of absence since October 28, 1992. He is being treated by Wilmington Psychiatric Associates. Dr. Daniel Y. Patterson MD is his attending physician.

It is the position of Cape Industries that the allegations brought by Mr. Jackson are totally

unfounded. It is our belief that the information submitted clearly shows that Mr. Jackson was not discriminated against. Therefore, we respectfully request a finding of no probable cause for all charges in this case.

Sincerely,

/s/ Ronald L. Rasile
Ronald L. Rasile,
Human Resources Manager

[Excerpts from Respondents' notes on Warren Jackson]
Career Objectives
- Consider: Can your career goals and objectives be met at Cape? In light of your overall priorities? In light of the Cape management style? In light of our business strategy?
- RI is possible without a step change
- RI definition: "Results and/or manner in which they are obtained frequently do not conform to requirements performance must improve within a reasonable time."

Bottom Line:
1.) Behavior is affecting performance
2.) Cape/personal business priorities affecting performance Warren's comments:

Re, Sep 21: "maybe I over-stepped my bounds"
Re, Sep 24: Concerning the process of the meeting: "at the end of the process I saw the value", "moving forward"
Re, Artisan: Doing it now due to Artisan window, "trying to juggle things is an issue with me"

Our expectation is a step change in these areas:

1.) with the team
2.) transparent outside activities

Oct 12, 1992

from Ken Stach's notes:

Miguel noted that he is uncomfortable with Warren working on the Low Acid Recovery project. Miguel noted that Lee Harris is also uncomfortable. e.g..

- Not reviewing Pampa flowsheets
- No other "active" projects
- Sits back when he should be reading
- Has not demonstrated commitment to project

Miguel will meet with Human Resources then Warren later in the week.

Supreme Court, U.S.
FILED
OCT 7 1998
OFFICE OF THE CLERK

No. 98-412

In The

Supreme Court of the United States

October Term, 1998

WARREN I. JACKSON,

Petitioner,

vs.

NCT CORPORATION and PFS CORPORATION, a joint venture d/b/a "HOECHST CELANESE POLYESTER INTERMEDIATES",

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

NCT Corp. and PFS Corp. operate as a North Carolina joint venture general partnership under the name of "Hoechst Celanese Polyester Intermediates." NCT Corp. and PFS Corp. are owned 100% by HCC Holdings, Inc., which is owned 100% by HNA Holdings, Inc., formerly known as Hoechst Celanese Corporation, which is a subsidiary of Hoechst AG, a publicly held entity in Germany.

NCT Corp. and PFS Corp. do not have any nonwholly owned subsidiaries.

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Statute:

42 U.S.C. § 2000e *et seq.* 1

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Supreme Court Rule 10 14

STATEMENT OF THE CASE

The relevant facts have been set forth in Respondents' memorandum of law in support of summary judgment, which is reproduced in full in the Appendix to the pending petition for writ of certiorari. *See* A11-A56. In the interest of judicial economy, Respondents hereby incorporate by reference the statement of facts which is already of record before the Court. *See* A12-A23.

In addition to the foregoing, Respondents present the following procedural history to aid the Court in addressing the pending petition:

Petitioner Warren I. Jackson, a former employee of Cape Industries (a predecessor of the Respondents), filed this action on December 1, 1995 alleging that he was discriminated against on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. *See generally* Complaint, A80.

On September 5, 1996, after the close of discovery, Respondents filed a motion for summary judgment, supported by a memorandum of law *(reproduced at A11-A56)* and exhibits. Petitioner filed a response in opposition to the motion for summary judgment on October 3, 1996 *(District Court Docket Entry No. 42)*, and Respondents filed a reply brief on October 15, 1996. *(Reproduced at A57-A74)*.

On October 29, 1996, the Honorable James C. Fox signed an order granting Respondents' motion for summary judgment. *(Reproduced at A4-A8)*. The order was filed on October 30, 1996, and the District Court entered judgment in the case pursuant to Judge Fox's order. *(Reproduced at A1-A3)*.

On November 8, 1996, Petitioner filed a motion captioned "Motion for Reconsideration," complaining about the manner in which the district court drafted the order granting summary judgment. (*District Court Docket Entry No. 46).* Respondents filed a response on November 19, 1996, pointing out, *inter alia*, that the District Court had explained the basis for the grant of summary judgment in sufficient detail. *(District Court Docket Entry No. 47).* Judge Fox denied Petitioner's motion for reconsideration by order dated December 17, 1996. *(Reproduced at A9-A10).*

Petitioner filed a Notice of Appeal on January 16, 1997 *(District Court Docket Entry No. 49)*, appealing the orders granting summary judgment on October 29, 1996 and denying the motion for reconsideration on December 17, 1996. The United States Court of Appeals for the Fourth Circuit affirmed the district court in a *per curiam* opinion issued on April 28, 1998. *(Reproduced at A77-A79).*

Petitioner filed a Petition for Rehearing With Suggestion for Rehearing En Banc on or about May 11, 1998. The Fourth Circuit denied the petition and suggestion for rehearing in an order filed on June 9, 1998. *(Reproduced at A75-A76).*

Petitioner filed the instant petition on or about September 9, 1998.

SUMMARY OF ARGUMENT

This case presents none of the considerations customarily required to warrant Supreme Court review, and is therefore a particularly inappropriate candidate for the exercise of this Court's certiorari jurisdiction. The courts below applied well-accepted legal principles to the evidence of record in determining that Respondents were entitled to summary judgment.

The district court entered summary judgment, and the Fourth Circuit affirmed, for the simple reason that Petitioner failed to present evidence sufficient to create a genuine issue of material fact regarding his claims of discrimination. In their briefs filed below, the parties cited numerous cases setting out the proper standard for addressing a motion for summary judgment in an employment discrimination action, the elements of a *prima facie* case, and the subsequent burdens of the parties in the event that a *prima facie* case is provisionally established.

Upon consideration of the facts of record and the controlling caselaw, the district court properly held that Respondents were entitled to summary judgment on the numerous grounds advanced in their summary judgment brief and reply brief. In particular, the district court noted that summary judgment should be entered because the court found "in the record no evidence that Plaintiff's disability was caused by unlawful discrimination or harassment on the part of the defendants." *See* A7. The district court therefore found, as Respondents had argued, that Petitioner failed to show that he had been subject to any adverse employment action, and failed to make out a *prima facie* case. *See* A25-A41.

Contrary to Petitioner's assertion, there is no conflict among the Circuits on any of the legal issues necessary to a determination of the underlying case. No Circuit court has held that an employment discrimination plaintiff can avoid summary judgment without presenting evidence to support each element of a *prima facie* case. Nor has any Circuit court held that, even after a *prima facie* case has been established, an employment discrimination plaintiff can avoid summary judgment without fulfilling the employee's burden of producing evidence to rebut an employer's articulation of a legitimate, nondiscriminatory reason for its actions. In short, the summary judgment entered in Respondents' favor was not based on a misunderstanding of

the controlling caselaw. Rather, summary judgment was properly entered as a result of, among other things, Petitioner's failure to meet his burden of producing evidence (a) to establish the elements of a *prima facie* case, and (b) to rebut Respondents' legitimate nondiscriminatory reason for their actions (assuming for the sake of argument that Petitioner had even established a *prima facie* case).

Petitioner advances the spurious argument that the district court's opinions did not identify the elements of a *prima facie* showing of employment discrimination. However, the district court clearly stated that its ruling was based on the reasons presented in the Respondents' briefs. Those briefs, in turn, cited numerous decisions which set out the elements of a *prima facie* case. Petitioner cannot seriously contend that the district court was unaware of the elements of a *prima facie* case.

Equally unavailing is Petitioner's argument that the district court based its decision on an assessment of Petitioner's credibility, rather than on the absence of supporting evidence in the record. Petitioner apparently bases this argument on the district court's statement that summary judgment was warranted for the reasons stated in Respondents' briefs. Clearly, the district court based its decision on the evidence and legal arguments presented in Respondents' motion, briefs, and exhibits — not on an improper resolution of any material factual dispute. Indeed, the district court correctly indicated that it "must view the facts in the light most favorable to the non-moving party, and draw all reasonable inferences in his favor." *See* A6, *citing Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

Finally, Petitioner has raised arguments in his petition for writ of certiorari which were not raised in the proceedings before the district court and the Fourth Circuit. To the extent

that the pending petition is based on arguments which were not timely raised below, this Court should not consider such arguments as a basis for granting certiorari.

Because this case presents no issue worthy of Supreme Court review, the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD NOT GRANT CERTIORARI, SINCE THE COURTS BELOW CORRECTLY APPLIED WELL ESTABLISHED LEGAL PRINCIPLES TO THE FACTS OF RECORD IN GRANTING SUMMARY JUDGMENT.

Respondents' arguments in support of summary judgment are adequately set forth in the briefs reproduced in the Appendix to the petition, (*see* A11-A56, A57-A74), and will not be repeated here.

In addition to the evidence and arguments submitted to the district court below, Respondents state the following in response to the arguments raised in the petition for writ of certiorari.

A. Petitioner failed to establish a *prima facie* case of discrimination.

Respondents demonstrated to the district court that Petitioner failed to make out a *prima facie* case since he could not show that he was subject to any adverse employment action as a result of alleged discrimination. *See, e.g., United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983). In an attempt

to convince this Court to grant certiorari, Petitioner makes two fact-based arguments that were properly rejected by the district court as lacking any evidentiary support, and also raises a new fact-based argument which was not presented to the district court. None of these arguments is a proper basis for Supreme Court review.

1. This Court should not grant certiorari to review the district court's finding that there was no evidence of record showing that Plaintiff's disability was caused by unlawful discrimination.

The first argument which Petitioner properly preserved at the district court level is a futile attempt to show that there is a genuine issue of material fact regarding whether or not Respondents' alleged discriminatory conduct caused the disability that forced Respondent to cease work and go on long-term disability leave. *See* Petition at 19. Petitioner relies exclusively on the Affidavit of Dr. Patterson, a former treating psychiatrist, in an attempt to show that Petitioner's depression was related to the environment he was in at Respondents' workplace. However, the district court correctly held that, notwithstanding Dr. Patterson's affidavit, the record contained "no evidence that Plaintiff's disability was caused by unlawful discrimination or harassment on the part of the defendants." *See* A7.

Contrary to Petitioner's mischaracterization of Dr. Patterson's affidavit, Dr. Patterson never stated in the record that Petitioner's depression was caused by alleged discrimination. In fact, Dr. Patterson wrote in a June 18, 1993 letter:

> I am recommending that he [Mr. Jackson] seek employment outside of the petrochemical industry.

See A40.

The fact that Dr. Patterson recommended that Petitioner leave the petrochemical industry altogether demonstrates conclusively that Dr. Patterson believed Petitioner's problems were caused by general stresses that would be present in any job in the industry, rather than by alleged unlawful discrimination occurring at Respondents' workplace. Dr. Patterson's apparent belief that Petitioner's condition was in some way related to his work environment thus reflected general concern for Petitioner's ability to function in any engineering job in the petrochemical industry. None of Dr. Patterson's statements can be interpreted as an opinion that Petitioner's depression was caused by alleged discrimination. As the district court properly recognized, there was simply no evidence from which a trier of fact could find a causal link between Petitioner's disability and alleged discrimination.

2. There was no evidence of record showing disparate treatment in Petitioner's compensation.

The second argument that was properly rejected by the district court is that there was "disparate treatment in terms of petitioner's compensation." *See* Petition at 17. Petitioner argues to this Court that he was precluded from receiving a bonus and cost of living increase due to an October 1992 decision to rate his performance as "requires improvement." *Id.*

Petitioner's argument fails, however, since the undisputed evidence shows that he had not formally been rated "Requires Improvement" as of October 27, 1992, when he went on disability leave. As shown by the deposition testimony of Petitioner's direct supervisor, Miguel Chen, a 1992 year-end performance evaluation that would have rated Petitioner as "Requires Improvement" was prepared in January or February 1993, but was never administered due to Petitioner's absence from work. *See* A63.

Petitioner misleadingly cites to a portion of a deposition of Ken Stach (Petitioner's second line supervisor) in a further attempt to create a genuine factual issue on the question of whether Petitioner had been given a "Requires Improvement" rating in October 1992. However, Mr. Stach never testified that Petitioner was formally rated as "Requires Improvement." Rather, Mr. Stach testified that the performance review prepared in early 1993 "***would have*** resulted in a Requires Improvement" but was not administered since "the employee was out on leave." *See* A122, Lines 17-20. It is clear, therefore, that Petitioner had not been given a Requires Improvement rating as of October 1992.

In any case, Petitioner's job performance in October 1992 is not material to the issue of whether he was subject to an adverse employment action which affected his compensation. The undisputed evidence shows that raises and bonuses were not awarded until after the end of each calendar year, and it was Respondents' policy not to give raises or bonuses to an employee on leave until that employee returned to work. *See* A64-65. Thus, even if a decision had been made to rate Petitioner as "Requires Improvement," this would have had no effect on his compensation. Under Respondent's policy, Petitioner's salary would have remained constant and he would not have received a bonus until his return to work, which never occurred. *Id.*

3. Petitioner did not argue below that "functional isolation" constituted an adverse employment decision.

The argument that Petitioner failed to preserve by presenting it first to the district court and the Fourth Circuit is that the "functional isolation" of Petitioner constituted an adverse employment action under Title VII. *See* Petition at 14. It is an accepted rule of appellate procedure that ordinarily an

appellate court will only consider issues raised in the court from which the appeal is taken. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). "[I]ssues raised for the first time on appeal generally will not be considered." *Muth v. U.S.*, 1 F.3d 246, 250 (4th Cir. 1993).

Petitioner did not argue to the district court that functional isolation was an adverse employment action in this case. In fact, Petitioner's brief in opposition to the Respondents' motion for summary judgment did not even use the term "functional isolation." *See District Court Docket Entry No. 42.* Nor did Petitioner argue in any of his briefs filed with the Fourth Circuit that he could meet the adverse employment action prong of a *prima facie* case by showing that he was required to work in "functional isolation."

Because Petitioner failed to raise this argument at any juncture below, it would be an inappropriate basis for review by this Court on a writ of certiorari.

B. The result in this case was not affected by a purported split among the Circuits with regard to what a plaintiff must show to survive a summary judgment motion.

Summary judgment in this case was indisputably proper, since Petitioner had failed to establish a *prima facie* case of discrimination, as explained above. Even assuming, for the sake of argument, that Petitioner had made out a *prima facie* case, Petitioner is incorrect in asserting that the Fourth Circuit's "required showing for a Title VII plaintiff to defeat an employer's summary judgment motion is in conflict with this Court and other circuits." *See* Petition at 5. Contrary to Petitioner's claim, there is not a split among the Circuits regarding whether an employee's *prima facie* showing would be sufficient to avoid summary judgment in the face of an

employer's proffer of evidence demonstrating a legitimate, nondiscriminatory reason for its actions.

Petitioner correctly states the general rule that a plaintiff must establish a *prima facie* case, and then raise a genuine issue of material fact with regard to an employer's proffered legitimate business reason. *See, e.g., Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1321 (10th Cir. 1997); *Randall v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995); *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 n.3 (10th Cir. 1994); *Beall v. Abbott Lab.* 130 F.3d 614, 619 (4th Cir. 1997), *cited* in Petition at 6-7.

However, Petitioner is incorrect in his assertion that the Sixth Circuit holds that an employment discrimination plaintiff can — in all cases — defeat a motion for summary judgment merely by establishing a *prima facie* case. The case cited by Petitioner for this proposition, *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997), is not nearly so sweeping as Petitioner implies. While *Avery Dennison* does state, in *dicta*, that a defendant is not entitled to summary judgment if a plaintiff has proven its *prima facie* case, the decision involved the proper framework for evaluating evidence at a trial on the merits, rather than at the summary judgment stage. *Id.* at 860-61.

In other decisions which specifically address the standard for granting summary judgment, the Sixth Circuit has, in fact, indicated that summary judgment could be granted in the face of a *prima facie* showing, where the defendant articulates a legitimate nondiscriminatory reason and the plaintiff fails to offer contrary evidence. For example, in *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1227 (6th Cir. 1996), the Sixth Circuit denied a defense motion for summary judgment on the basis that the plaintiff presented evidence that the defendant's proffered reasons for its actions were pretextual. *Id.* Had the

law in the Sixth Circuit been — as Petitioner has asserted — that a *prima facie* showing was all that was required to avoid summary judgment, the *Ensley-Gaines* decision would not have had to discuss whether the plaintiff had presented further evidence beyond its *prima facie* case.

The decisions from the Tenth and Fourth Circuits cited by Petitioner at pages 6-7 of his Petition, holding that a mere *prima facie* showing of discrimination is insufficient to avoid summary judgment where the employer has articulated a non-discriminatory reason for its actions, are fully consistent with the decisions of this Court. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Court held that after a plaintiff establishes a *prima facie* case and the defendant produces admissible evidence in rebuttal, the plaintiff then retains the "ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff." *Id.*, 450 U.S. at 253. The Court further held that "assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury." *Id.*, at n.8. Thus, it is the full analysis of burdens of production under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), which allows a district court to determine whether summary judgment is appropriate. A court cannot deny summary judgment merely on the basis that a plaintiff has fulfilled his initial burden of establishing a *prima facie* case, if the plaintiff cannot also present evidence to rebut an employer's proffer of a legitimate, nondiscriminatory reason for its actions. *See, e.g., Blue v. U.S. Dept. of Army*, 914 F.2d 525, 535 (4th Cir. 1990), *cert. denied*, 499 U.S. 959, 111 S. Ct. 1580, 113 L.E.2d 645 (1991) ("The cases in which summary judgment has been granted a Title VII defendant, even after plaintiff was able to establish a *prima facie* case of discrimination, are numerous.").

Even if Petitioner had been able to make out a prima facie case, he presented no evidence to carry his "ultimate burden of proving that the employer intentionally discriminated against him." *Cook v. CSX Transportation Corp.*, 988 F.2d 507, 511 (4th Cir. 1993). Petitioner's argument that entry of summary judgment was improper due to his establishment of a *prima facie* case is both legally and factually flawed, and therefore does not provide a basis for Supreme Court review.

II.

THE DISTRICT COURT WAS WELL AWARE OF THE ELEMENTS OF A PRIMA FACIE CASE.

Petitioner advances the spurious argument that the district court did not consider whether or not plaintiff had made a *prima facie* showing, since it did not explicitly identify the elements of a *prima facie* case in its opinion. *See* Petition at 12. However, the district court clearly stated that its ruling was based on the reasons presented in the Respondents' briefs. *See* A7. Those briefs, in turn, cited numerous decisions which set out the elements of a *prima facie* case. *See, e.g.*, cases cited at A24-A28. In light of the district court's statement that it had "carefully reviewed the motion for summary judgment and supporting materials, and the materials submitted by the plaintiff in opposition to the motion, as well as the entire file," (*see* A6), Petitioner cannot seriously contend that the district court was unaware of the elements of a *prima facie* case.

Petitioner complains, particularly, that the district court did not set forth the legal elements for establishing a *prima facie* case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See* Petition at 11. The district court's failure to repeat the standard for a *prima facie* case is immaterial, since the court

clearly applied the standard. The district court indicated that its ruling was based on the Respondents' briefs, which cited numerous cases discussing the *McDonnell Douglas* model of addressing employment discrimination claims. *See, e.g., Crady v. Liberty National Bank & Trust Co.*, 993 F.2d 132, 134-135 (7th Cir. 1993) (discussing *McDonnell Douglas* and *Burdine*; cited at A26); *Ballinger v. North Carolina Agricultural Extension Service*, 815 F.2d 1001, 1005 (4th Cir.), *cert. denied*, 484 U.S. 897, 108 S.Ct. 232, 98 L.Ed.2d 191 (1987) (same; cited at A24); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 238-41 (4th Cir. 1982) (same; cited at A26); *Page v. Bolger*, 645 F.2d 227, 229-230 (4th Cir.), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981) (same; cited at A26).

The courts below were clearly aware of and correctly applied the governing legal principles to the evidence of record. Petitioner may not blindly presume that there was error below in the hope that this Court will revisit the same issues which have already been addressed by the district court and the Fourth Circuit. *Cf. Cornelius v. Nutt*, 472 U.S. 648, 658, 105 S. Ct. 2882, 2888, 86 L.Ed.2d 515 (1985) ("The burden is upon the appellant to show that based upon the record as a whole the error was harmful, *i.e.*, caused substantial harm or prejudice to his/her rights.").

III.

THE DISTRICT COURT DID NOT RELY ON A DETERMINATION OF PETITIONER'S CREDIBILITY.

Petitioner further asserts that certiorari is warranted to prevent the "practice of relying upon an employer's arguments . . . prior to a court rendering its decision on a matter of law." *See* Petition at 20. This argument does not provide a valid ground for Supreme Court review, and scarcely merits response.

The district court properly applied the established rule governing summary judgment motions that a "court must view the facts in the light most favorable to the plaintiff as the non-moving party, and draw all reasonable inferences in his favor." *See* A6, *citing Anderson v. Liberty Lobby*, 477 U.S. at 255. The district court made no credibility determinations in granting summary judgment. Rather, the court found that summary judgment was proper under Fed. R. Civ. P. 56(c), since the evidence of record showed "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* A6. The district court correctly observed that Petitioner failed to present evidence of record to support his allegations of racial discrimination. *See* A6-A7. The district court made no credibility determinations, since Petitioner failed to raise any genuine issue of material fact that needed to be resolved prior to entry of judgment as a matter of law.

The Supreme Court's rules state that a petition for writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, Rules of the Supreme Court of the United States. There is no question that the district court properly stated the standard for granting summary judgment. *See* A6. While Petitioner disputes the district court's application of this rule of law to the evidence of record, Petitioner's arguments are limited to the specific facts presented by this particular case, and do not warrant the extraordinary exercise of certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 98-412

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Warren I. Jackson,
Petitioner

v.

NCT and PFS Corp.
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF

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33 pp

QUESTIONS PRESENTED

This action under Title VII of the Civil Rights Act of 1964 alleges that employer discriminated against petitioner because of his race, black, in the terms, conditions, and privileges of employment. Respondents' motion for summary judgement was granted by the district court and affirmed by the appellate court after reviewing for reversible error.

1. There are diverging views and interpretations among the circuits with regard to what a plaintiff must show to survive a summary judgment motion. What is the appropriate showing, and did the district court make an error of law by requiring an ultimate burden of proof showing?

2. The district court, in ruling, did not establish the legal elements of a circumstantial, prima facie case of disparate treatment. Is this failure an error of law?

3. The district court, prior to rendering a decision as a matter of law, relied upon respondents' arguments. Since respondents inter alia, argued against petitioner's credibility, did the district court error?

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Warren I. Jackson,
Petitioner

v.

NCT and PFS Corp.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

Petitioner files this reply brief to only correct material misrepresentations and inaccuracies contained in respondents' brief in opposition, which go to the questions presented. This brief is not intended to address respondents' obfuscated inferences, conclusions, and accounting of facts on the merits.

The questions presented in the petition for a writ of certiorari filed September 8, 1998, were drafted under Rule 10 of the Rules of the Supreme Court of the United States. It is these questions that are at issue, not those reframed by respondents. Petitioner's questions presented are appropriate because of the following.

Question I contains a request for this Court to resolve a split among the circuits regarding the appropriate review standard for a plaintiff to survive summary judgment. This Court has historically resolved such splits among the circuits.

Question II asserts that in this case, the specific legal elements for a prima facie case of disparate treatment are missing and because of their absence, the search for disputed material facts, is precluded. In other words, controlling rules of law were not properly stated. Furthermore, the absence of these prima facie elements represents a fatal departure from the normal method of analysis in a Title VII case under *McDonnell*, such that this Court may exercise its supervisory power.

Question III involves a departure so far from the course of normal judicial procedure, particularly when coupled with the departure in Question II, that this Court may exercise its supervisory power. The district court relied upon respondents' arguments *prior* to rendering a decision on summary judgment,

made an assessment of credibility, and weighed evidence.

Respondents in their brief in opposition, have mistakenly alleged that there is no split among the circuits regarding the required showing for a plaintiff to survive summary judgment. Therefore, it is necessary to review this question in more detail.

In 1997, the sixth circuit decided that a plaintiff need only to establish a prima facie case to survive summary judgment. In *EEOC v. Avery Dennison Corp.*, 104 F. 3d 858 (6th Cir. 1997) the court stated:

> "The prima facie case is not the final inquiry, but rather the first prong of analysis which defeats a motion for dismissal prior to trial. The Supreme Court so noted this in Aikens . . . In fact, a prima facie case is defined as 'sufficient evidence . . . to get plaintiff past a motion for directed verdict . . . or motion to dismiss . . . it is the evidence necessary to require defendant to proceed with his case.' It necessarily follows, then, that defendant is not entitled to judgement as a matter of law **or summary judgment if a plaintiff has proven its prima facie case.**" *Id* at 861. (Emphasis added.)

Even in the earlier case of *Ensley-Gaines v. Runyon*, 100 F. 3d 1220 (6th Cir. 1996), cited by the respondents in their brief in opposition, the court held that "plaintiff has met the burden of establishing a prima facie case of discrimination . . . and summary judgement in favor of the defendant was inappropriate." *Id* at 1227. The court did not state in this case that plaintiff must demonstrate pretext to survive summary judgment. Hence, respondents' argument as to why the court engaged in further discussion with regard to pretext, is merely speculation.

Unlike the sixth circuit, the second, seventh, and tenth circuits require that a plaintiff 1) establish the prima facie case, and 2) make a showing of pretext with regard to the legitimate non-discriminatory reasons proffered by the employer.

In *Holt v. KMI Continental, Inc.*, 95 F. 3rd 123 (2d Cir. 1996), the second circuit held

> " . . . to survive a motion for summary judgment . . . plaintiff must put forth adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not . . . race was the real reason . . ." *Id* at 129.

In *Payne v. Milwaukee County Review Bd.*, 146 F. 3d 430 (7th Cir., 1998), the seventh circuit held

> "If the employer gives a legitimate non-discriminatory reason for the adverse employment action, the plaintiff must prove this reason is mere pretext for discrimination" *Id* at 433.

In *Morgan v. Hilti, Inc.*, 108 F. 3d 1319 (10th Cir. 1997), the 10th circuit held

> "On summary judgment, plaintiff's burden is only to demonstrate genuine dispute of material facts as to whether the proffered reasons were unworthy of belief" *Id* at 1321.

The third standard of review, known commonly as "pretext-plus", is used to determine if a plaintiff survives summary judgment in the first, fourth, and fifth circuits.

In *Dichner v. Liberty Travel, et al.*, 141 F. 3rd 24 (1st Cir. 1998), the first circuit held

> "To prevail under federal law, it is insufficient for a plaintiff merely to undermine the veracity of the employer's proffered justification . . ." *Id* at 30.

In *Gillins v. Berkeley Elec. Coop., Inc.*, W.L. 381092 (4th Cir. 1998), the fourth circuit held

> "To survive . . . summary judgment . . . plaintiff must do more than merely raise a jury question about the veracity of the employer's proffered justification."

In *Walton v. Bisco Industries, Inc.*, 119 F. 3rd 368 (5th Cir. 1997), the fifth circuit held

> "The plaintiff cannot succeed by proving only that the defendant's proffered reason is pretextual." *Id* at 370.

Clearly there is conflict among th circuits with regard to the appropriate showing for a Title VII plaintiff to survive summary judgement and hence, for a plaintiff to pursue his right under the law to seek affirmative relief. Among the circuits there is a prima facie only showing, a pretext showing, and a pretext-plus showing. This confusion is the result of various interpretations among the circuits of this Court's writings in *Hicks* 509 U.S. 502 (1993).

In the present case, respondents argued in their summary judgment motion a pretext-plus standard by asserting that plaintiff " has not forecast evidence to carry his ultimate burden of proving discriminatory treatment," to which the district court agreed by adoption (see petition at A41).

Now to briefly address respondents' assertion that the district court was aware of the elements of a prima facie case (see brief in opposition at page 12). Respondents' argument is totally unsupported by the record in this case. The district court never set forth in its opinions the four prong prima facie case elements, unique to this case, using the *McDonnell* model. The Court of Appeals for the Fourth Circuit failed to identify these elements as well since they reviewed only for reversible error versus de nova. These prima facie elements were never set forth in respondents' motion for summary judgment and reply brief, which the district court adopted and relied upon.

The argument by respondents as to what the district court was aware of is highly speculative. At best, one can only conclude from respondents' argument that the district court was aware of the prima facie elements in those cases that respondents cited in their summary judgment motion and reply brief.

Respondents continue their sophistry by asserting in their opposition brief at page 13 that the district court in ruling, rejected their arguments against petitioner's credibility. However, the record in this case contradicts respondents' clairvoyance: the record shows that the district court adopted respondents' arguments, and the respondents introduced credibility arguments into the record in their dismissal motion (see petition at page 16).

When the district court adopts the respondents' findings of fact and conclusion of law:

> "Those findings, though not the product of the workings of the district judge's mind, are formally his . . ." *United States v. El Paso Gas Co.*, 376 U.S. 651, 656 (1964).

In addition to the district court adopting respondents' direct assault on petitioner's credibility, the district court agreed that the psychiatric reports from other medical professionals should be given more weight than the affidavit of petitioner's treating psychiatrist, Dr. Patterson, with regard to the cause of petitioner's depression/disability (see A59-A61 and A108-A110 of petition). This is quite similar to *Payne v. Milwaukee County*, 146 F. 3d 430 (7th Cir. 1998) wherein the district court's granting of judgment as a matter of law was overturned. The appellate court in *Payne* held that:

> "When a case turns on credibility, neither side is entitled to judgment as a matter of law . . . Here it was improper for the district court to give credit to Dr. Jentzen's testimony over that of the other witnesses." *Id.* at 433.

Finally, respondents' allegation that petitioner's "functional isolation" should be precluded from consideration by this Court because this information was not presented to the courts

below, is a conscious misrepresentation of the record in this case. In his EEOC affidavit (see petition at A91-A92) petitioner states that he requested support personnel to assist him and was denied. In his deposition testimony, petitioner stated that the restriction placed upon him by management meant that he could not perform his job (see petition at A115). In his petition for rehearing submitted to the appellate court, and shown in the appendix of this reply brief beginning at page B1, petitioner even discussed his functional isolation in the format of *McDonnell* (B9-B10). To date, respondents have failed to proffer any legitimate non-discriminatory reason for this functional isolation of petitioner.

CONCLUSION

The circuits are divided with regard to the required showing for a Title VII plaintiff to survive summary judgment, and as a result, protected class members in many cases are unjustly being precluded from pursuing affirmative relief. Petitioner respectfully requests that this petition for writ of certiorari be granted such that these inconsistencies will be addressed.

Additionally, in this specific case the district court has gone far beyond the fact finding and conclusion adoption method in *El Paso*, 376 U.S. 651, by relying upon respondents' arguments *before* rendering a decision as a matter of law. Nevertheless, respondents' credibility assessment,

evidence weighing, and case analysis without the McDonnell model, now belong to the district court.

Because the record is clear that the district court has so far departed from the normal course of judicial proceedings, petitioner respectfully calls for, without any further briefing or argument, an immediate reversal of the district court's order entering summary judgment against him, or in the alternate a reconsideration or remand of the district court's orders.

Respectfully Submitted

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APPENDIX

Petition for Rehearing with Suggestion for Rehearing en Banc

97-111
UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

Case No. 97-1111

WARREN I. JACKSON	)
	)
Appellant	)
v.	)
	) **APPELLANT'S**
NCT CORPORATION	) **PETITION**
and **PFS**	) **FOR**
CORPORATION,	) **REHEARING**
a joint venture	) **WITH**
DBA "HOECHST CELANESE	) **SUGGESTION**
POLYESTER	) **FOR REHEARING**
INTERMEDIATES",	) **EN BANC**
Appellees.	)

INTRODUCTION

To the Honorable Chief, Senior, and Circuit Judges of the United States Court of Appeals for the Fourth Circuit, Appellant presents this petition for rehearing with suggestion for rehearing en banc of the above cause, and in support, respectfully shows:

1. The Appeal in this cause was submitted April 16, 1998.

2. On April 28, 1998. This Court rendered its decision in favor of Appellees and against Appellant, affirming the judgment of the United States District

Court for the Eastern District of North Carolina, Southern Division.

3. Appellant seeks a rehearing on the following grounds:

I. Material facts and law have been overlooked, and

II. The opinion of the District Court is in conflict with United States Supreme Court decisions and the conflict is not addressed in the opinion.

Specifically,

A. The District Court's opinion fails to recognize controlling law set forth by McDonnell-Douglas Corp. v. Green 411 U.S. 792, 36 L 2 Ed. 668, 93 S. Ct. 1817 (1973), which requires a presumption of discrimination when plaintiff establishes a prima facie case.

B. The District Court 's opinion also fails to recognize controlling law as sets forth by Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L 2 Ed. 207, 101 S. Ct. 1089, which requires that the employer meet his burden of production to rebut the presumption of discrimination established by a prima facie showing.

BACKGROUND FACTS

Appellant filed his amended complaint under Title VII on December 12, 1995, in Unites States District Court, Eastern District of North Carolina, Southern Division, case No. 7:95-CV-175-F(3). Appellant claimed that he was subjected to different terms and conditions of employment versus similarly situated white senior process engineers. Specifically, Appellant alleged that he was assigned a significantly heavier project responsibility and was required to work without assistance, whereas similarly situated white senior process engineers had less responsibility and utilized less senior personnel in

accomplishing their objectives. Appellant alleged that this disparate treatment, coupled with numerous supervisory contacts, caused him to go into depression. Appellant further alleged that this disparate treatment was due to his race, black.

In addition to the mental and emotional distress suffered, Appellant, through deposition testimony of supervisor Miguel Chen, confirmed that he had suffered additional harm with regard to compensation, when on October 12, 1992, Miguel Chen notified Human Resources that Appellant's performance was to be rated "Requires Improvement." The requires improvement performance rating automatically resulted in Appellant being ineligible for a bonus and cost of living pay increase in the upcoming year, as testified to by supervisors Miguel Chen and Ken Stach. **See Chen Depo. at 129, 12 thru 130, 8; 131, 6 thru 132, 13 : Ex 38, Defendants' Reply Brief in Support of Motion for Summary Judgment. See also Stach Depo. at 125, 9 thru 126, 7 : Ex. B, Plaintiff's Opposition to Defendants' Motion for Summary Judgment.**

On September 5, 1996, Appellees filed their Motion for Summary Judgment shortly following the end of discovery. Appellees argued that

1) Appellant was not subjected to any adverse action and his allegations are not credible based on psychiatric reports;

2) Even if Appellant could establish a prima facie case, he could not meet his ultimate burden of proving discriminatory treatment;

3) Appellant could not make a claim of harassment since it was not included in his EEOC charge; and

4) Appellant's EEOC charge was untimely.

Appellant filed his response to Appellees' summary judgment motion on October 3, 1996. On October 30, 1996, the District Court entered its Order granting Appellees Summary Judgment. The Honorable Judge James Fox wrote:

> "The court need not repeat the facts of the case or engage in a lengthy discussion of law and its application to those facts . . . . the defendants have

> adequately and accurately exposed the numerous weaknesses in his case in their memorandum in support of the motion for summary judgment and in their reply brief. For the reasons stated there, and because the court finds in the record no evidence that plaintiff's disability was caused by unlawful discrimination or harassment on the part of the defendants, defendants' motion for summary judgment is allowed...
> "

Jackson v. NCT and PFS Corp. No. CA-95-175-F (E.D.N.C. Oct. 30, 1996)

Appellant filed a motion to reconsider on November 8, 1996 requesting that the District Court clarify the basis for its October 30,1996 Order.

The district court denied Appellant's motion to reconsider on December 17, 1996.

ARGUMENT

The District Court's October 30, 1996 opinion is too vague to ensure that the court has applied the appropriate legal test. The opinion is not framed in the language of McDonnell-Douglas Corp., v. Green, 411 U.S. 792, 36 2. Ed. 2d. 668, 93 S. Ct. 1817 (1973), nor

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L. Ed. 2d. 207, 101 S. Ct. 1089. The criteria for establishing the prima facie case and burden of proof set forth by these two cases are controlling in this Title VII cause.

Since there is no mention of these cases in the District Court's October 30, 1996 and December 17, 1996 opinions, and the only criteria set forth as controlling is that of Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986) and Smith v. Virginia Commonwealth University, 84 F. 3d. 672, 675 (4th Cir. 1996) (en banc), one can only conclude that the familiar McDonnell-Douglas and Burdine criteria were not applied.

Establishment of the prima facie case carries with it a presumption of discriminatory intent per McDonnell-Douglas and Burdine. Analogous to McDonnell-Douglas, Appellant in this cause must establish a prima facie case by showing that 1) he is a member of a protected class, 2) he was qualified for his position and his performance was satisfactory, 3) despite

his qualifications and satisfactory performance, he suffered harm due to an adverse employment decision by his employer, and 4) similarly situated employees outside of the protected class were treated less harshly.

With the establishment of the prima facie case by the employee, the burden of production shifts to the employer to articulate legitimate non-discriminatory business reasons to rebut the presumption of discrimination which comes with the establishment of the prima facie case. However, the employer's rebuttal evidence must be legally admissible at trial, and cannot be an answer to complaint nor argument by counsel, as set forth by Burdine. In addition, Burdine requires that the articulated non-discriminatory business reasons be "clear and reasonably specific."

Once the employer has disposed of his burden of production, only then does the burden shift back to the employee to demonstrate pretext. Burdine sets forth clearly and precisely how this is to be done: 1) directly, by plaintiff persuading the court that a discriminatory reason more likely motivated the employer, or 2)

indirectly, by showing that the employer's proffered reasons are unworthy of credence. Plaintiff must be afforded "a full and fair opportunity" to demonstrate pretext.

The above criteria set forth by McDonnell-Douglas and Burdine, must merge with the standard for review of summary judgment, in evaluating Appellees' motion for summary judgment in this Title VII cause.

I. The record clearly shows that Appellant has meet the requirements for establishing a prima facie case in this cause as set forth by McDonnell-Douglas.

1. It is undisputed that Appellant is a member of a protected class.

2. It is undisputed that Appellant was qualified for his position. It is also undisputed that Appellant's performance was satisfactory at mid-year 1992 and up to October 2, 1992, based on the testimony of supervisor Ken Stach. **(See plaintiff's opposition to**

defendants' motion for summary judgment, Ex. B. Stach Depo: 101, 13 thru 102, 2)

3. The record is clear that in June, 1992 different terms and conditions of employment were imposed upon Appellant during his mid year review. Appellant testified during deposition that supervisor Miguel Chen set a requirement that Appellant was to do all of his work without assistance, and Appellant project workload totalled $9.2 million. These terms and conditions would make it impossible for Appellant to get a satisfactory 1992 performance rating. Appellant alleged that he became depressed as a result of being under these working conditions. The record is clear that Appellant's mental and emotional distress was due to his working environment.

4. The record shows that the other three similarly situated white senior process engineers, with significantly smaller project work loads, used less senior personnel to assist them, and were in fact commended for directing these individuals.

See Jackson Depo. at 76, 23 thru 78, 23. See also Ex. A: Jackson affidavit, Ex. E: Dr. Patterson affidavit, and Chen Depo, at 25, 3-22; 27, 2-3; contained in plaintiff's opposition to defendants' motion for summary judgment.

Appellant's allegations must be assumed true in evaluating the motion for summary judgment. Appellant has shown all elements of the prima facie case which under McDonald-Douglas, carries the presumption of discriminatory intent, and shifts the burden of production to the Appellees.

2. Appellees have failed to dispose of their burden of production, by failing to articulate clearly and specifically their non-discriminatory reasons for the disparate work load and requiring that Appellant work without assistance. Therefore the presumption of discrimination remains in tact, and Appellees are not entitled to summary judgment.

Appellees have not clearly and specifically proffered any legitimate reason to explain the disparate treatment of Appellant. Instead, they challenge through arguments of counsel, the cause of Appellant's disability. However, the presumption of discrimination still remains; the Civil Rights Act of 1991 recognizes the mental and emotional distress caused by discrimination and allows for recovery.

Even if Appellees' challenge as to the cause of Appellant's disability is interpreted as a response for the purpose of disposing of their burden of production, their challenge must fail under Burdine.

Burdine sets forth that the evidence presented in rebuttal of the prima facie case cannot be a response to complaint, or an argument of counsel, and the evidence must be admissible at trial. Appellees' challenge comes through argument of counsel. In addition, the psychiatric reports Appellees' use 1) are irrelevant since they do not state that Appellant's condition *was not* caused by the Appellees, and are based on evaluations of Appellant that took place three years after he first became disabled and

left work; 2) have not been authenticated; and 3) are therefore not admissible at trial. Hence, Appellees fail to dispose of their burden of production.

3. Appellees' Denial of Appellant's Bonus and Pay Increase was Discriminatory.

To establish the prima facie case, Appellant must show that 1) he is a protected class member, 2) his performance was satisfactory, 3) he was denied a bonus and pay increase, and 4) other employees outside the protected class and similarly situated were not denied their bonus or raise. The state of the record shows that the above criteria has been satisfied.

1) Again, protected class is undisputed.

2) *Appellees'* contend that *Appellant's performance was satisfactory*, since he

never received his 1992 year end performance review. To this point, Appellant will concede. **See Defendants' Reply Brief for Summary Judgment, page 4.**

3) It is undisputed that Appellant was denied a bonus and pay increase.

4) From the testimony of Ken Stach, other similarly situated employees were not on a requires improvement (RI) plan, and Appellant was the only senior engineer that Stach had ever put on a RI plan. Therefore, the record infers that similarly situated employees were not denied their bonus and pay increase. **See Ex B: Stach Depo. at 102, 14-24; 125, 9 thru 126, 7 in Plaintiff's Opposition to Defendants' Motion for Summary Judgment.**

4. Appellees' proffered non-discriminatory reasons for denying Appellant a pay increase and bonus are demonstrated by the record to be false.

Appellees have articulated that the reason Appellant did not received a pay increase was because he was not at work at the time raises were given. However, cross examination of human resource manager Roy Neal reveals that the articulated reason is false. The record as stands shows that even if Appellant had been at work, he would not have gotten a pay increase **See Ex. B: Neal**

Depo. at 78, 18 thru 82, 21 ; Plaintiff's Opposition to Defendants' Motion For Summary Judgment. Per the criteria set forth by Burdine, demonstrating that a proffered non-discriminatory reason is unworthy of credence is sufficient to refute employers' rebuttal of the prima facie case; the presumption of discrimination remains, and so Appellees are not entitled to summary judgment.

Appellees' proffered reason for denying Appellant a bonus is that his performance was rated requires improvement. Appellant has already shown per the record that this proffered reason is false (**See Defendants' Reply Brief for Summary Judgment , page 4**). Consequently, the prima facie case along with its binding presumption of discrimination remains in tact, and Appellees are not entitled to summary judgment.

SUMMARY

Appellant respectfully request that his petition for rehearing with suggestion for rehearing en banc be granted, because the opinion rendered by the District

Court appears to be in conflict with controlling law as set forth by McDonnell-Douglas and Burdine. Although it may have been more appropriate for Appellant to forego the suggestion and to base his petition solely on material facts and law being overlooked , Appellant was precluded from doing so since the District Court failed to discuss controlling law with regard to the facts in this case, thus leaving Appellant to speculate as to what was overlooked.

This suggest however, a much larger issue than those immediately contained in Appellant's cause: **should the absence of a requirement under Fed. R. Civ. P. 52(a) that a court set forth in its opinion findings of fact and conclusions of law, preclude the Burdine requirement that a plaintiff be afforded "full and fair opportunity" to refute an employer's articulated non-discriminatory reasons.**

Nevertheless, Appellant believes that he has set forth sufficient reasons to justify a reversal of the District Court's decision to grant Appellees summary judgment. THEREFORE, for the reasons set forth by this petition,

Appellant prays for a reversal of the District Court and remand for trial.

This the 10th day of May, 1998.

Respectfully Submitted,

/s/ Warren I. Jackson

Warren I. Jackson, pro se -
Appellant